MISSISSIPPI LAW JOURNAL

JOHN WADE: TEACHER, LAWYER, SCHOLAR
Ronald J. Rychlak

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VOLUME 65 FALL 1995 NUMBER 1

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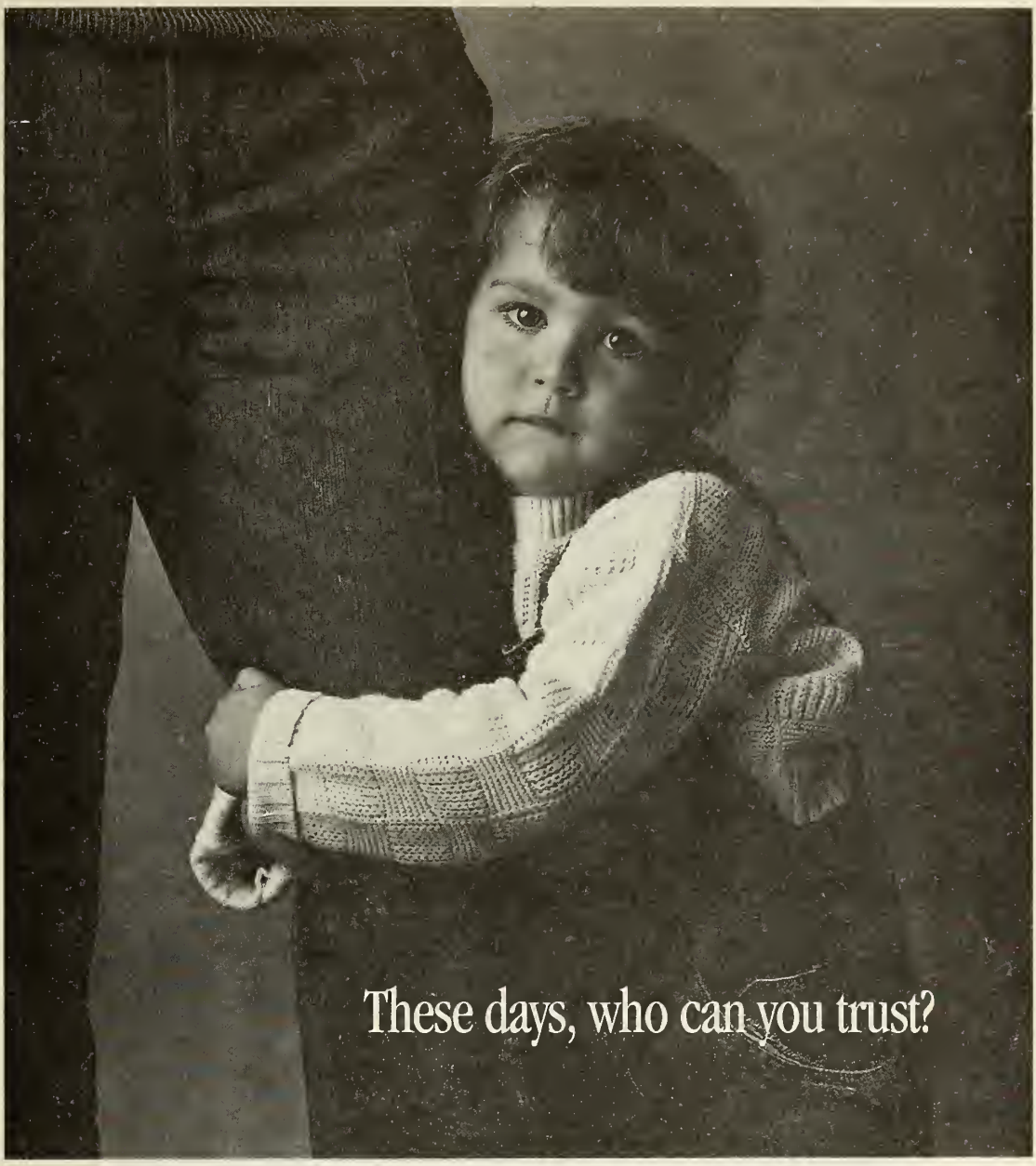

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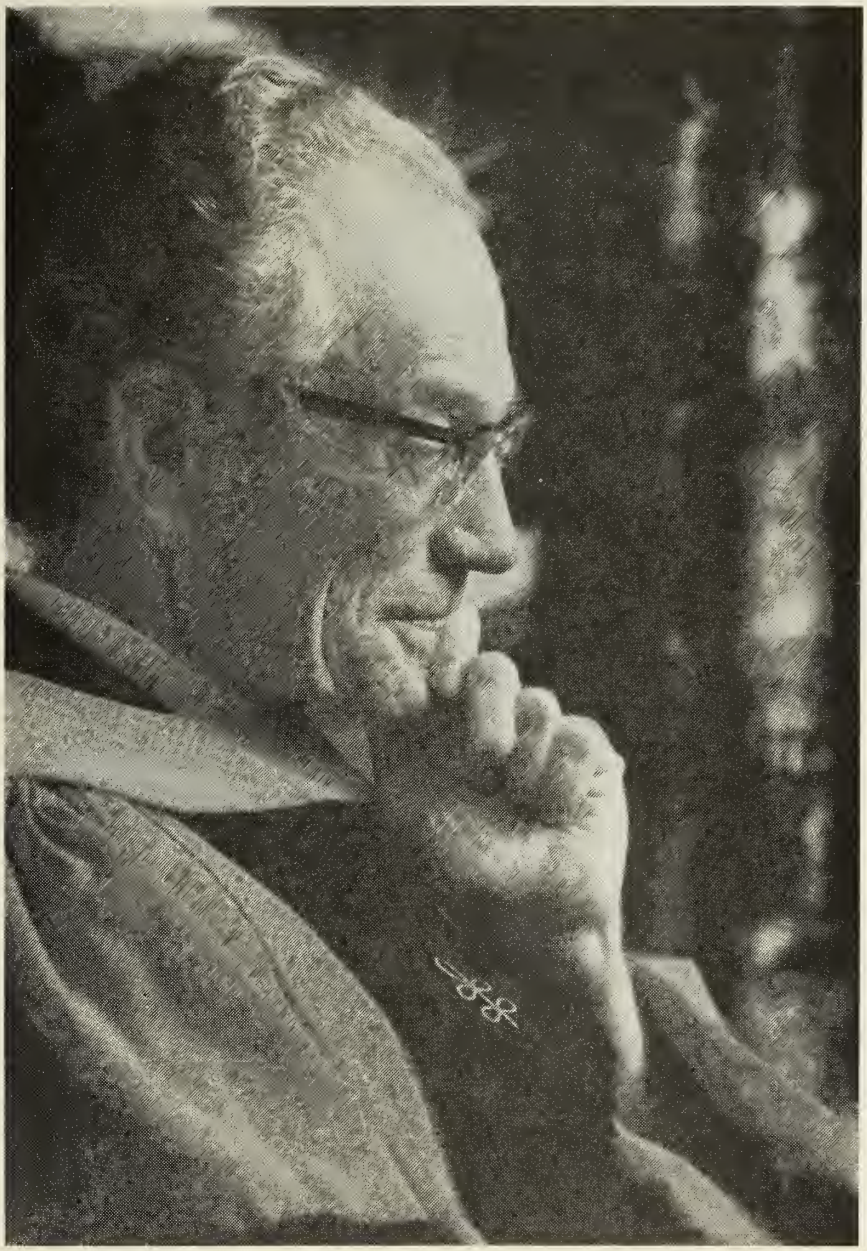
In Memoriam

The following memorial articles testify to the tremendous influence Dean John W. Wade had on the field of law. A brilliant scholar, professor, and administrator, Dean Wade touched virtually every aspect of the modern legal community. With his passing the University of Mississippi School of Law, as well as the *Mississippi Law Journal*, lost a loyal alumnus. As editor in chief for the 1933-34 school year Dean John W. Wade published his first legal piece—a case commentary on conflict of laws. Fortunately for the *Journal* and the legal profession this first work was not his last. His future contributions to the *Mississippi Law Journal* would make up some of the most important articles the *Journal* has ever published. In recognition of his many contributions to the Law School and the *Journal*, the John W. Wade Scholarship has been established for the *Journal* member who best represents the integrity and dedication so evident in this great man.

It is with great pleasure that the *Mississippi Law Journal* dedicates this issue to Dean John W. Wade.

Dave Sanders
Editor-in-Chief



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TRIBUTE TO DEAN JOHN WADE

JOHN WADE: TEACHER, LAWYER, SCHOLAR . . . *Ronald J. Rychlak* 1

DEAN JOHN WADE AND THE LAW OF TORTS . . . . . *Gary Myers* 29

ARTICLES

TAKING ISSUE WITH ISSUE PRECLUSION: REINVENTING COLLATERAL ESTOPPEL . . . . . *Eli J. Richardson* 41

MISSISSIPPI COURTS: 1790-1868 . . . . . *Michael H. Hoffheimer* 99

RECENT DECISIONS

MEDICAL MALPRACTICE—JURY INSTRUCTIONS—"MERE ERROR OF JUDGMENT" LANGUAGE IS NO LONGER APPROPRIATE IN MEDICAL MALPRACTICE JURY INSTRUCTIONS . . . *Jim Wilson* 171

FAMILY LAW—REHABILITATIVE ALIMONY—AN ANSWER TO MISSISSIPPI'S INCONSISTENT TREATMENT OF DURATIONAL ALIMONY . . . . . *Charles Galloway* 187

JOHN WADE: TEACHER, LAWYER, SCHOLAR

Ronald J. Rychlak[*]

"I am lucky because I was able to do what I most loved to do. I was able to teach law."
- John W. Wade

In 1994, the legal community lost one of its most influential thinkers. John Webster Wade, graduate of the University of Mississippi School of Law, former professor and Assistant Dean at that same law school, and former professor and Dean at the Vanderbilt University School of Law, was a dedicated teacher, a prolific scholar, and an influential lawyer. During his sixty-year era of accomplishment in the law, he had a commanding influence on the lives of thousands of students and on the law itself.

John Wade has been called "Vanderbilt's most productive and influential dean and law teacher."[1] He was co-author of successive editions of the definitive textbook on tort law, he wrote a widely-used book on restitution, and he published more than one hundred articles on torts, restitution, and legal education. As Chief Judge Merritt of the United States Sixth Circuit Court of Appeals wrote, "During his life, [Dean Wade] had more influence on the shaping of the legal system and the law in our state than any politician or judge, and he had as

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[*] Associate Professor of Law, the University of Mississippi. The author would like to thank Mary Moody Wade for her invaluable contribution of personal papers and for her comments and observations. The author also is grateful for support from the Lamar Order at the University of Mississippi.

[1] Gilbert S. Merritt, Jr., *VU's Wade Made a Fine Mark on Law*, TENNESSEAN (Nashville), Aug. 28, 1994, at 6D.

much influence on the national legal system as any other Tennessean of his generation."[2] As the University of Mississippi School of Law wraps up its sesquicentennial celebration, it is appropriate to take a look back at John Wade's remarkable life and career.

BIOGRAPHY

John Wade's father, John William Wade, was a native of Morton, Mississippi. He earned three degrees at the University of Mississippi, the final one being awarded by the law school in the early 1900s. After graduation, he married Sara Webster, "a member of a pioneer Mississippi family, who was a graduate of the Union Female Academy and a native of Oxford."[3] Together, they moved to Little Rock, Arkansas, where John William became a circuit judge and they started a family. Their first child, John Webster Wade, was born on March 2, 1911. Three daughters would follow. Judge Wade hoped one day to step down from the bench and go into the practice of law with his son, but the judge died when John was only fifteen years old. John's mother then moved the family back to her ancestral home in Oxford, Mississippi, where she had family and friends to help her take care of John and his sisters.

John's high school and college days were spent in Oxford, Mississippi. Because he had to help with family finances, young John worked in his uncle's dry goods store while attending Oxford High School. However, he still managed to edit the school paper and graduated with special distinction.

After high school, John stayed in Oxford to attend the University of Mississippi. In college, he was elected president of the senior class and served as editor of the school newspaper, editor of the "M Book" (yearbook), and editor of "Vox," the Latin paper. He received the Taylor Medal in English and the Odom Prize for the best essay on a selected political subject.

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[2] Merritt, *supra* note 1, at 4.

[3] Robert J. Farley, *Dean John Webster Wade*, 25 VAND. L. REV. 9, 9 (1972).

He was even inducted into the University's Hall of Fame.

During his senior year, John taught history classes to make extra money. He enjoyed this so much that he briefly considered a career as a history professor, but upon graduation at the top of his class in 1932 (A.B. with special honors), he decided to enter law school. He described one of his first classes as follows:

> It was at the height of the Great Depression, and the first-year law class at the University of Mississippi School of Law was a comparatively small one—somewhere around thirty. As we filed into the first class room, there was a slight young teacher seated at the desk who looked as if he might be one of us. His opening lecture was given somewhat diffidently, but it was interesting, and we looked forward to the next class with him. At the next session, as he called on us to give cases, he quickly had the whole class engaged in vigorous discussion. It was fun! It offered intellectual stimulation that was completely exciting, and we continued to look forward to his classes with eager anticipation.[4]

That Professor, Wex Malone, remembered John as "the delight and the despair of a beginning law teacher" due to his "characteristic mode of attack by way of imperturbable but relentless prodding."[5]

Long-time dean of the law school, Robert Farley, remembered John's ambitious nature:

> Although modest and respectful in demeanor, he never hesitated either to question an instructor or to make him defend or explain practically any positive assertion; he reversed the approved method and questioned Socrates! He was always prepared and had read not only the assignments but also seemed to have researched the footnotes [sic] and the reference literature.[6]

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[4] John W. Wade, *Ruminations on a Premier Torts Professor*, 44 LA. L. REV. 1161, 1161 (1984) [hereinafter *Ruminations*].

[5] Wex S. Malone, *John W. Wade: Friendly Critic and Sensitive Scholar*, 25 VAND. L. REV. 13, 13 (1972).

[6] Farley, *supra* note 3, at 10.

While in law school, John wrote the first of over a hundred law review pieces, beginning with a case commentary for the *Mississippi Law Journal*.[7] He also became editor-in-chief of the *Journal* and "graduated with 'Special Distinction' and an all-time high record, which will never be surpassed. He ha[d] an 'A' in every subject."[8]

Teaching those history classes caused John to realize how much he loved teaching; so when he was offered a scholarship to do graduate work at Harvard, he saw it as a way to better prepare himself to teach law. He received his LL.B (with special distinction) from Mississippi in 1934 and went on to Harvard.

After one year at Harvard, John earned his LL.M, *cum laude*, with the highest grade point average in his class. He was then granted an even larger scholarship to stay on and pursue a doctorate. He completed his class work for his S.J.D. in one year, but he had to teach himself Norman French in order to translate thirteenth and fourteenth century English cases that he needed to complete his dissertation. The degree was awarded in 1942.

While at Harvard, John completed his first full-length law review article, which appeared in the *Harvard Law Review*.[9] He was the first student to have a lead article published in the *Harvard Law Review*.[10]

When he returned to Mississippi in 1936, John was a member of the Mississippi Bar and had the opportunity to go into private practice, but he truly loved teaching. Teaching also offered a degree of security for a young man still providing sole support to his mother and three sisters. He returned to Missis-

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[7] John W. Wade, *Recent Important Decisions*, 6 MISS. L.J. 174 (1933) (addressing Bean v. Bean, 147 So. 306 (Miss. 1933)).

[8] Farley, *supra* note 3, at 10. Although Dean Farley reported that John "was popular with his fellow students," he also noted that the students once circulated a petition asking that John not be called upon for the rest of the term, and requesting "such other further and general relief as might seem . . . proper." *Id.*

[9] John W. Wade, *Acquisition of Property by Willfully Killing Another—Statutory Solution*, 49 HARV. L. REV. 715 (1936).

[10] Merritt, *supra* note 1, at 5.

sippi "as a fledgling member of the law faculty."[11]

Wade was appointed Assistant Professor of Law at the University of Mississippi in 1936, promoted to Associate Professor in 1938, and promoted to Full Professor in 1940. Over the years he taught Bills and Notes, Civil Procedure, Conflict of Laws, Corporations, Damages, Domestic Relations, Insurance, Legislation, Partnership, Real Property, Restitution, Taxation, Torts, and Trusts. He also acted as Assistant Dean, handling a large portion of the school's administrative matters.

Professor Wade was also very active in the community, the Bar, and the University. He served on numerous bar committees and was eventually elected president of the Junior Bar Section of the Mississippi State Bar Association. He served as a deacon in the First Presbyterian Church of Oxford, and he was a member of or advisor to numerous honorary societies. He also was faculty advisor to the *Law Journal* and even served on a national committee that reconsidered the direction and aims of the Association of American Law Schools.

In the summer of 1942, like many other young men, Professor Wade enlisted in the military. The only concern reflected in his application letter was that his mother and sisters be adequately supported. Although his application indicates that his eyesight was acceptable and corrected by glasses, family history has it that he had to memorize the eye-chart to pass the exam. In any case, with a letter of recommendation from University Chancellor Butz (who was then on military leave), Professor Wade was accepted into Marine intelligence.

After boot camp at Parris Island, John received his commission at Quantico, Virginia. According to a report written in 1945, "Campus-bred John Wade looked like anything but a Marine officer when he reported as a fledgling second lieutenant."[12] However, Lieutenant Wade earned the respect of his peers and superiors with dedication, bravery, and intelligence.

Lieutenant Wade fought with the victorious Fourth Marine

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[11] *Ruminations*, *supra* note 4, at 1161.

[12] Jim Lucas, *Ole Miss Assistant Dean is a Tough Marine Veteran Who Became Hero Hard Way*, THE COM. APPEAL (Memphis), Nov. 5, 1945.

Division at Roi-Namur, Saipan, and Tinian, but his bravery and intelligence faced the most severe test at Iwo Jima:

> The Fourth Division's landing zones stretched north from halfway up the shoreline to the high cliffs above the East Boat Landing. Masses of reinforced concrete blockhouses armed with coastal defense guns and artillery, and a maze of bunkers, caves, and pillboxes packed with antitank and heavy machine guns, honeycombed the steep slopes. From this high ground around the quarry, enemy firepower was zeroed in on the division's beaches and made them a roaring death trap. . . . But the Fourth's assault battalions had had relatively easy going until General Kuribayashi sprang the counterattack. Then . . . they were easy targets for the downpour of artillery, mortars, and concentrated machine guns.[13]

As an intelligence officer, Lieutenant Wade's duty was to gather information from the front, prepare reports for the generals, then relay orders back to the front. Although he received reports over the phone, he personally verified those reports. Thus, he faced enemy fire on a daily basis. According to Maj. Gen. Clifton B. Cates:

> [W]hile serving as an assistant to a Marine Intelligence officer, from Feb. 19 to March 16, 1945 . . . . Lieutenant Wade made daily visits to the front lines, remaining in exposed positions and subjected all the while to enemy mortar and small arms fire . . . . Lieutenant Wade submitted at the appointed hour daily reports which were of inestimable value to the commanding general and his staff in the prosecution of a bitter struggle against the enemy.[14]

These personally verified reports were so well respected that "Wade was more frequently in conference with generals and colonels than with officers of his own rank."[15]

One week before Japan surrendered, Lieutenant Wade was awarded the Bronze Star for his service on Iwo Jima. One 1945

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[13] BILL D. ROSS, IWO JIMA: LEGACY OF VALOR 74 (Vintage Books 1985).
[14] Lucas, *supra* note 12.
[15] *Id.*

report read, "The whole section functioned like a football team. Wade was the quarterback."[16] He also received two Presidential Unit Citations for uncommon bravery in battle.

When Wade returned to Mississippi in 1945, a newspaper story reported, "Hardened, bronzed, veteran of three of the toughest campaigns in the Pacific war, he looks like anything but a college professor today."[17] Wade himself was surprised at the change in his life and commented, "It seems hardly possible . . . . We've been fighting a long time and then, suddenly, we're at peace."[18]

In the summer of 1945, Professor Wade met his life-long love, Mary Moody Johnson. They were wed in June 1946, and eventually became the proud parents of four children. This imposed greater financial strains on Wade, as he was still supporting his mother and one sister. Nevertheless, an annual report for the year 1946 indicates that he wrote articles that appeared in the *Texas Law Review*, *Illinois Law Review*, *Pennsylvania Law Review* and *Mississippi Law Journal* and did significant work on two other articles while serving as President of the Junior Bar Section (now known as the Young Lawyers Division) of the Mississippi Bar Association and as Assistant Dean of the law school.

The University of Mississippi paid a comparatively low salary, and the influx of returning G.I.s swelled the number of students from forty-five to over 300, so the demands put on faculty members were significant. In the meantime, other schools were taking note of this fine young teacher and scholar. In 1946, Professor Wade accepted a one-year visiting position at the University of Texas. After that, he was invited to interview for a position at the University of Tennessee. On the way to Knoxville he stopped in Nashville to visit the law school at Vanderbilt University. He was hired on the spot and never completed the journey to Knoxville.

When Professor Wade joined the law faculty at Vanderbilt,

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[16] *Id.*
[17] *Id.*
[18] *Id.*

the situation was uncertain. The law school had closed during World War II and had only been reopened for one year. The faculty was small, particularly in relation to the returning veterans who were pursuing a legal education. Professor Wade's abilities as a teacher, scholar, and administrator did not, however, go unnoticed. When the time came in 1952 to replace Dean Ray Forrester, Professor Wade was the logical selection.

In 1952, when John Wade became dean, the Vanderbilt Law School "was a modest, regionally oriented institution."[19] It had never occupied its own building.[20] Classrooms were jammed into the top floors of the University's administrative center.[21] The full-time faculty consisted of seven professors and the dean.[22] The undersized law library was housed in what at one time had been the University Chapel.[23] The school's endowment was minuscule, and its annual budget demanded frugality.[24] The law school, like the University, was segregated. John Wade, however, "was a giant in his two decades as the dean" of Vanderbilt Law School.[25]

In spite of problems with the facilities, Dean Wade gave first priority to the development of legal scholarship and the instructional programs of the law school.[26] He felt that "[a] law school should be a place of intellectual ferment."[27] Dean Wade knew that the school could attain a national reputation only through concentration on scholarship and publications. This called for a two-part plan.

The first part of the plan was to bring in senior professors

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[19] Reber Boult, *John W. Wade: An Appreciation*, 25 VAND. L. REV. 24, 24 (1972).

[20] Paul H. Sanders, *John W. Wade and the Development of the Vanderbilt Law School*, 25 VAND. L. REV. 19, 22 (1972).

[21] John J. Costonis, *From the Dean*, 25 VAND. LAW. 2 (1994).

[22] Sanders, *supra* note 20, at 21.

[23] *Id.*

[24] Costonis, *supra* note 21, at 2.

[25] *Id.*

[26] Sanders, *supra* note 20, at 20.

[27] John W. Wade, *Legal Education and the Demand for Stability and Change Through Law*, 17 VAND. L. REV. 155, 156 (1963) [hereinafter *Legal Education*].

already established as excellent teachers and scholars. Dean Wade sought out professors who were drawing retirement from other law schools and therefore had fewer salary demands. They, in turn, helped bring a national reputation to Vanderbilt. Some of the faculty members he recruited were Edward Morgan and Warren Seavey from Harvard and Elliott Cheatham from Columbia.[28]

Dean Wade also worked with Vanderbilt's publications. He felt that if Vanderbilt were to be recognized as a national law school, it would have to be reflected in the law review. He had served as advisor to the law review since he joined the faculty. He encouraged the law review to improve the quality of articles it published, encouraged the faculty to write and publish more and better articles, and actively solicited articles from scholars that he met at various conferences. Over the years, he personally contributed thirty-five pieces to the *Vanderbilt Law Review*. "Without question he was the person most responsible for the firm and early establishment of the *Vanderbilt Law Review* as a nationally recognized major legal publication. The reputation of the *Law Review*, in turn, constituted a major component in the advancement of the School . . . ."[29]

Dean Wade also increased the number of publications at Vanderbilt Law School. During his deanship, the law school initiated the *Race Relations Law Reporter*, *The Reporter* [the magazine for law alumni], *The Dicta* [the student paper], and the *Vanderbilt Journal of Transnational Law*.[30] The school also instituted a faculty-taught, intensive first-year legal writing program.

Dean Wade was particularly proud of the writing program he established at the law school, and noted: "Each faculty member has a small group of students whom he counsels generally, and whose writings he inspects and criticizes individually. . . . Use of all of the faculty members has indicated to the students the importance . . . we attach to the work and our

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[28] Costonis, *supra* note 21, at 3.
[29] Sanders, *supra* note 20, at 19.
[30] Costonis, *supra* note 21, at 3; Sanders, *supra* note 20, at 22.

interest in the development of each individual."[31]

Among the other innovations at the law school were establishment of the Environmental Law Society, the International Law Society, the Law Students Civil Rights Research Council, the Legal Aid Society, a placement service, and a clinical legal education program.[32] Students and prospective employers reflected a broader national base as did the teaching and scholarship of an increasingly distinguished faculty which had grown from eight professors to twenty-two full-time and fifteen part-time members.[33] The law library grew from 40,000 to more than 1,000,000 volumes and was recognized as one of the best of its size in the country. During his tenure as dean, enrollment increased from 128 to 483 students. Through it all, Dean Wade continued to teach two sections of Torts each year and to write highly influential law review articles.

One of Dean Wade's most important struggles was the integration of the law school. Over the strong opposition of many alumni who sought to fire the entire law faculty,[34] Dean Wade and his closest colleagues (including some supportive alumni) courageously and successfully fought a very tough battle to integrate the Law School in 1956.[35] This took place before many other parts of the University had integrated, and Vanderbilt was the first private law school in the South to do so.

With Dean Wade's support and funding from the Ford Foundation, the Vanderbilt Law School faculty published the *Race Relations Law Reporter*, the first national publication chronicling post-*Brown v. Board of Education* developments in

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[31] *See Legal Education*, *supra* note 27, at 159.

[32] Costonis, *supra* note 21, at 3; Sanders, *supra* note 20, at 22.

[33] Sanders, *supra* note 20, at 21.

[34] Because post-war classes had been much larger than pre-war classes, Dean Wade and his two closest colleagues knew a majority of the active alumni. They personally called each of these more recent alumni to urge them to attend the meeting that would decide the law school's fate. As a result, the vote came out in favor of integration.

[35] In 1963, Wade was one of 46 prominent lawyers who called on Governor George C. Wallace of Alabama to step aside and allow the registration of three black students at the University of Alabama.

the race relations field. This publication "soon became the preeminent legal journal dealing with the burgeoning civil rights movement."[36]

Dean Wade also was an early promoter of the interests of women in the law. He oversaw the introduction of women into the law school, and in 1971 he hired Vanderbilt's first female law professor, Martha Craig Daughtrey, who later became a judge on the United States Sixth Circuit Court of Appeals.

Dean Wade's efforts in integrating the law school did not go unnoticed. In 1962, Vanderbilt University built the first law school building in its history, funded largely by the Ford Foundation, which saw the Vanderbilt Law School as being especially well positioned to carry forward the legal and social revolution triggered by the Supreme Court's decision in *Brown v. Board of Education*.

When Wade stepped down as dean, the Law School had three publications of professional quality: *The Race Relations Law Survey*,[37] the *Vanderbilt Journal of Transnational Law*, and the *Vanderbilt Law Review*. Dean Wade was granted the title "Dean Emeritus and Distinguished Professor Emeritus." He and a member of the medical faculty were Vanderbilt's first "Distinguished Professors."

Dean Wade was in very high demand as a visiting professor at law schools throughout the nation. He answered the request of many schools, including Cornell, Hawaii, Memphis State, Michigan, Pepperdine, Missouri, Washburn, William and Mary, and the University of Mississippi. "As a result, he probably taught or lectured at more law schools than any other person in our legal history."[38]

During the subsequent years (until his failing health prevented it) Dean Wade continued to engage vigorously in his professional pursuits—carrying the Restatement (Second) of Torts to completion, editing the leading torts casebook, acting

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[36] Roger J. Traynor, *John W. Wade: Gentle Scholar, Pilot Lawyer*, 25 VAND. L. REV. 16, 17 (1972).

[37] This replaced the *Race Relations Law Reporter* in 1969.

[38] Merritt, *supra* note 1, at 5.

as Uniform Laws Commissioner, publishing numerous articles in legal periodicals, and most of all, returning to his first love, teaching law students.

Along the way, Dean Wade remained very true to his *alma mater*, the University of Mississippi. In addition to teaching at the law school in the 1930s and '40s, he returned to teach for a semester in the early 1980s. He also wrote ten pieces that appeared in the *Mississippi Law Journal* (second only to the thirty-five he wrote for the *Vanderbilt Law Review*), and he wrote two pieces that appeared in the *Annual Proceedings of the Mississippi Law Institute*. His *Mississippi Law Journal* article, *On the Nature of Strict Tort Liability for Products*, is surely among the most influential pieces ever to have appeared in the *Journal*.[39]

When he died in 1994, his widow, Mary Moody Wade, had his remains returned to Oxford, Mississippi, where many members of his family still reside.

Attributes of a Law Professor

A simple biographical sketch of the man John Wade does not sufficiently explore those things that were most important to him. What made him the lawyer, scholar, and teacher that he was? What can we learn from his life and his writings to help us in conducting our own lives?

In paying tribute to another law professor,[40] Dean Wade once wrote, "I can think of no one who would make a better colleague in a law faculty. He is considerate, patient with deficiencies and faults of others, and quick to give encouragement. He gets pleasure out of promoting his friends but is willing to provide honest, critical advice."[41] Those who knew John Wade best say the same about him.

It is hard to identify the specific factors that would cause someone to be universally recognized as an exemplary teacher,

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[39] *See infra* note 97.

[40] The late Wex Malone, former law professor at the University of Mississippi and Louisiana State University.

[41] *Ruminations*, *supra* note 4, at 1164.

lawyer, and scholar. Fortunately, Dean Wade often wrote about his profession and set forth his thoughts on how best to teach law and to practice law. By examining those writings, we can see what he thought was most important and how he tried to meet the standards he set for himself.

According to Dean Wade, there are three aspects of a premier law professor: classroom teaching, service to the profession, and scholarship. Not only did Dean Wade excel in all three of these individual categories, he was able to synthesize these obligations so that they were complementary aspects of his professional life. That may be one of the secrets to John Wade's remarkable accomplishments.

Classroom Teaching

According to Dean Wade, the characteristics of a premier law professor:

> "[he] has enthusiasm for teaching—he likes what he is doing and looks forward with eager anticipation to the coming class. He delights in the give-and-take of the classroom and creates that same enjoyment in his students. He has true empathy for the students and their concerns and desires, but he is aware of what the course should do and he sees that it is done. He has a good sense of humor and does not hesitate to poke fun at himself as well. His repartee is quick and spontaneous, but not biting; it gives an impression of laughing with the target rather than at him. He prepares carefully in advance for the class, but does not utilize a detailed outline that straight-jackets the discussion and restricts its spontaneity. He experiments with teaching methods and varies techniques to keep the class from becoming too routine. He is careful to maintain a fair and balanced approach—for example, in torts, not favoring unduly the side of either plaintiffs or defendants. And he makes apparent to the students the practical implications and applications of the rules and principles they are deducing from the cases.[42]

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[42] *Id.* at 1165.

Anyone who studied under Professor Wade recognizes that he was able to bring all of these attributes to his classes.

Some students called him "Cobra John," in recognition of his "incisive questioning" and his ability to "pounc[e] upon the most unsuspecting of [students] during class."[43] Even when you were prepared, it could be an adventure[44] due to his:

> jabbing hand, the lanky, angular figure, the Abe Lincoln face, the outstretched arms with fingers intertwined, the hands thrust deeply into pockets jingling change, and the stalking to and fro . . . . Likewise [were] the elements of his method - the artfully constructed hypotheticals, the Latin phrases, the scholarly and concise statements defining a division among courts on a rule of law, and the inevitable *questions* based not upon the facts but upon the "point" of the recited case. . . .[45]

Although his questioning could be tough, Dean Wade did not endorse the "boot camp" approach to the classroom.[46] He used humor to break the tension and create a relaxed mood. "Wisecracks and corny puns, especially if they are extemporaneous,

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[43] Costonis, *supra* note 21, at 2. Dean Wade was apparently known by many names over the years. In his childhood, he referred to himself as Jack. Farley, *supra* note 3, at 9. Thanks to a Robert Taylor movie entitled *The Law and Jake Wade* (1958), every student that I knew in the early 1980s referred to him respectfully as "Jake." *See generally* James H. Wildman, *Mr. Wade and Wade Torts*, 25 VAND. L. REV. 26, 26 (1972) (discussing how students addressed Dean Wade).

[44] I feel particularly well qualified to address this issue. Not only did I study torts under him, Dean Wade was the first professor to call on me in class. Unlike most of our other professors, Dean Wade required students to stand when they were called upon. When I heard my name called - for the first time in law school - I stood up, recited the facts of the case, then gave my analysis of the court's reasoning.

We had just completed our discussion of establishment of duty in torts, and this was the first case regarding breach of duty. Unfortunately, I analyzed the case as one of establishment of duty. Dean Wade looked at me and said, "Well, Mr. Rychlak, you're telling me that I have this case in the wrong part of my book!" It was the kind of statement that every law student dreads, but I knew that there was nothing really to fear. This was only precise instruction, spiced with good natured humor that was easy to recognize, even by a terrified student.

[45] Wildman, *supra* note 43, at 26.

[46] John W. Wade, *Some Observations on the Present State of Law Teaching and the Student Response*, 35 MERCER L. REV. 753, 764 (1984) [hereinafter *Observations*].

will give rise to laughter and sometimes to friendly boos."[47] As a Wade admirer once noted: Some days Dean Wade would make no declaratory statements for the whole hour. Except to say, "Good Morning," every sentence would be a question, probing and analyzing deeper and deeper into the subject.

> With exasperation, a student said in class one morning, "Dean, why do you never make a positive statement, only questions?" After a pause, the [D]ean answered, "Why not?" The tension relieved, the class fell into laughter, and at the end of the hour rose as one to give him a standing ovation.[48]

This light touch made Professor Wade's classes enjoyable, even though there was always the risk that he might call on you.

Dean Wade was an expert at the Socratic method and clearly held it in high esteem. He stated:

> [T]he law class is analogous to a chemistry class engaged in performing a laboratory experiment. The students take the facts given in the particular case, analyze the relevant legal problems, go through the same reasoning process that the appellate court apparently used, and determine whether they come out with the same result - and, if not, why not. Unlike the chemistry class, this class is not necessarily expected to reach the same result as the court.[49]

He wrote that this method "stimulated mental powers and developed ingenuity and analytical abilities."[50] He was not, however, unwilling to consider other approaches.

Dean Wade supported experimental forms of teaching. In his writing he called for a "revolution - an atomic breakthrough in methods of legal education that will enable us to unleash hitherto untapped energy and resources to meet the demands of the period now unfolding."[51] He suggested that the problem

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[47] *Id.* at 770.

[48] Merritt, *supra* note 1, at 4.

[49] *Observations*, *supra* note 46, at 761.

[50] *Legal Education*, *supra* note 27, at 158; *see also Observations*, *supra* note 46, at 760 (stating traditional method teaches students to think like lawyers).

[51] *Legal Education*, *supra* note 27, at 158-59.

method may "be a very effective way of using individual work of the student."[52] Although he felt that lectures were not generally effective in law school, he recognized that lectures coupled with questions from the students might be the best available approach when time constraints offered no alternative.[53]

Dean Wade recognized that "skills" courses, like drafting, appellate argument, interviewing, and counseling, could not be taught using the Socratic method.[54] He supported the use of seminars, law review, moot court, clinics, and summer internships as teaching vehicles to round out a law school curriculum.[55] However, he cautioned against confusing the role clinics and other practice-oriented courses play in a law school. "The important idea to keep in mind is that their primary purpose is educational, so that their worth should be evaluated from that standpoint."[56]

At Vanderbilt, Dean Wade required each graduate to complete a major piece of research and writing prior to graduation.[57] Ethics and Profession of Law classes were supplemented with a series of evening lectures by officers in bar organizations, judges, and community leaders.[58] He even advocated the use of non-legal materials in the curriculum.[59] He mentioned, "Our goal should be not merely to instruct in the principles of the law but to prepare the whole lawyer, the complete lawyer, the great lawyer—practicing law 'in the grand manner.'"[60] This is what came to be known as the Vanderbilt experiment with the pervasive approach to legal education.[61]

Dean Wade's pervasive approach to legal teaching was

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[52] *Id.* at 159; *see also Observations*, *supra* note 46, at 767.

[53] *Observations*, *supra* note 46, at 763.

[54] *Id.* at 767.

[55] *Legal Education*, *supra* note 27, at 160; *Observations*, *supra* note 46, at 767.

[56] *Observations*, *supra* note 46, at 767.

[57] *Legal Education*, *supra* note 27, at 160.

[58] *Id.* at 162.

[59] *Id.* at 160.

[60] *Id.* at 161.

[61] Theodore Smedley, *The Pervasive Approach on a Large Scale—"The Vanderbilt Experiment,"* 15 J. LEGAL EDUC. 435 (1963).

designed to address the whole person. He called for a:

> [C]oncerted effort to use a pervasive approach throughout the whole of the law curriculum in developing a sense of professional responsibility in our students.
>
> Law and order are necessary to make any systematic adjustment to change. We must identify and preserve the lasting values of our civilization-the basic ideals and fundamental institutions which are essential.
>
> . . . .
>
> Legal education succeeds best in this area when it instills in the student an appropriate sense of responsibility for law reforms - a readiness to seek to improve the law not just in order to aid his clients but in order to make it a more effective instrument to meet the general needs of current times.
>
> One thing which we law schools can do is to direct our courses more to the future.[62]

Because he regularly encouraged students to pursue a life of public service,[63] his foresight in legal trends influenced decision-makers for generations.

Despite his love of teaching law, and his great respect for various teaching methods, Dean Wade did not hesitate to point out problems he saw developing in legal instruction. Thus, he noted problems associated with ever-growing class sizes, grade inflation, tuition increases, interference with classes due to the recruitment process, commercial outlines and "canned" briefs, and dull classes.[64] Typical of his style, however, he did not simply catalog the problems, but offered concrete suggestions on how to improve law schools. He suggested authorizing professors to consider class participation in their grading, increasing the number of hours required for graduation, tightening academic standards, focusing on teaching ability when hiring faculty members, varying teaching methods in upper-

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[62] *Legal Education*, *supra* note 27, at 163-65.

[63] *Id.* at 161-62. "The capable, able lawyer is inevitably a leader in his community. We must persuade our graduates to take consciously the responsibilities of community leadership." *Id.*

[64] *Observations*, *supra* note 46, at 758-60.

level classes, and respecting law students as adults.[65] He also flatly rejected the use of objective examinations which, "although much easier to grade, point out issues and allow a bright student with only superficial knowledge of the general subject to guess correctly."[66]

While teaching at the University of Mississippi in the 1940s, Dean Wade was called upon to write about his classes and his style of teaching. He reflected:

> I like the actual teaching, the give-and-take of classroom discussion and the association with the students. To a material degree I believe I am able to transmit this liking to the students; and I think that the vast majority of them take real pleasure in my classes. I work the students much harder than the average [professor] and I am a stiff grader, but my classes are popular. In teaching I very seldom lecture but use the dialectic method, developing an argumentative discussion in which practically the whole class takes an active part.[67]

Most of his students would agree that this is a pretty good description of his classes. It was never "easy," but it was always fun.

Service To The Legal Profession

The second characteristic of a premier law professor, according to Professor Wade, relates to service to the profession. He wrote:

> [A] premier law professor is conscious of his relationship to others in the legal profession. This includes his relationship with students and colleagues, judges and lawyers, and to a large extent, the public in general. He recognizes an appropriate sense of responsibility toward each of these groups and willingly meets it.[68]

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[65] *Id.* at 765-69.
[66] *Id.* at 765.
[67] Letter on file with author.
[68] *Ruminations*, *supra* note 4, at 1165-66.

Dean Wade was very attentive to his duty to the profession. In fact, his respect for legal practitioners is reflected in his referring to law professors as "practitioners of the profession of law teaching."[69]

Dean Wade viewed his work to improve the legal system as a moral obligation. "[T]here is a continuing duty to seek to improve the administration of justice, to better the procedural rules and the substantive rules, to find means to eliminate delay in court, to find better means of selecting judges, of improving the legislative process."[70] He carried out his duties with great vigor.

Over the years, Dean Wade served on the Advisory Committee to the Reporter for the Restatement (Second) of Torts from 1956 to 1970, at which time he became the Reporter,[71] a position he held until 1982, when he once again became a member of the Advisory Committee.[72] In his role as Reporter,

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[69] *Observations*, *supra* note 46, at 772.

[70] John W. Wade, *Public Responsibilities of the Learned Professions*, 21 LA. L. REV. 130, 133-34 (1960) [hereinafter *Public Responsibilities*].

[71] When Professor William Prosser resigned as Reporter two years before his death, portions of the outstanding drafts of the Restatement, especially those concerning defamation and privacy, had been outdated by major upheavals in the law. Overall, the drafts required extensive revision and supplementation. Volumes three and four, "bearing the distinct imprint of Wade's careful reconsideration of the areas of law treated therein," were published in 1977 and 1979 respectively. Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts (5th ed.) and the Prosser Legacy*, 39 VAND. L. REV. 851, 863 n.55 (1986) (reviewing W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984)).

[72] Dean Wade obviously found great enjoyment in his work on the Restatement. The Advisory Committee was composed of about a dozen members, most of whom were law professors. He posited:

> [T]he most stimulating experience we encountered in our teaching careers was the set of annual meetings we participated in as Advisors to the Reporter for the Restatement (Second) of Torts—Bill Prosser. In another context I described those meetings in this way:
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> > Each of us had studied drafts carefully and had suggestions and criticisms. Comments from one person struck fire from another. We were are all immensely stimulated by the association, and there was always much said, sometimes quite vigorously. Those meetings, I am sure, were the highlight of the year for each of us. There's an ecstasy in the intellectual give-and-take of friends who

he finished drafting the Restatement (Second) of Torts.

Dean Wade became a Commissioner on Uniform Laws in 1961 and a Life Member in 1981. He served on the Board of Trustees for Rhodes College in Memphis commencing in 1966 and thereafter. He was chairman of the Southern Conference of Law Teachers in 1963-64. He served on the Executive Committee of the Association of American Law Schools in 1957. He was involved with the American Law Institute, the American Judicature Society, and the United States Secretary of State's Advisory Committee on Private International Law.

Dean Wade served as chairman of a Blue Ribbon Commission that reformed the Tennessee Supreme Court. He was also very active in the Tennessee judicial selection process. In 1988 he became "of counsel" to a Nashville law firm, and while in his eightieth year, acting as counsel in a seminal Tennessee case,[73] he wrote the brief that prompted the state supreme court to adopt "the most far-reaching reform of tort law in this century."[74]

Dean Wade was active in his church since his days in Oxford. He served as chair of the Permanent Judicial Commission for the Presbyterian Church in the United States in the mid-1950s and again in the 1960s. He also served as the chair of the Permanent Nominating Committee in 1970-71.[75] He was

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> are vividly discussing something they are fully expert in and who have true respect for each other. Halcyon days . . . that phrase seems just right.

Ruminations, supra note 4, at 1164 & n.17 (citing John W. Wade, *William L. Prosser: Some Impressions and Recollections*, 60 CALIF. L. REV. 1255, 1257 (1972)). Dean Wade's love of law teaching, however, caused him to find similar stimulation in at least some of his classes. *Observations*, *supra* note 46, at 769 (noting primary difference as being that classes only lasted fifty minutes).

One of the other members of the advisory board, also a one-time law professor at the University of Mississippi, remembered Dean Wade as possessing "some rare capacity to refine the points of difference between us, manag[ing] to emerge with the happy phrase or expression to which we could all assent." Malone, *supra* note 6, at 15; *see also* Traynor, *supra* note 36, at 17 (stating, "he painstakingly coordinated the often variant views").

[73] McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).

[74] Merritt, *supra* note 1, at 4.

[75] According to Dean Wade, members of the learned professions have a special

National President of the Order of the Coif from 1973 to 1976. He served as the Reporter for the Tennessee Supreme Court's Commission on Specialization and was a member of the American Bar Association, the Mississippi Bar Association (President of the Junior Bar Section, now known as the Young Lawyers Division, in 1945-46), the Tennessee Bar Association, the Nashville Bar Association, and the New York City Bar Association. He also received numerous awards for teaching, scholarship, and contributions to the law.

Dean Wade recognized the bar and other professional associations as having a special role and duty. "The organizations exist primarily for the advancement of . . . justice or teaching, not of the individual members, as in the case of trade unions."[76]

Beyond his personal contributions to the profession, Dean Wade actively encouraged students to be of service to the profession and to the community.[77] The "Vanderbilt experiment" was an effort to teach the broad issues of a lawyer's social and moral responsibility in the context of regular substantive courses so that morality and ethics would be presented as "integral elements" of a lawyer's professional status.[78]

It is this combination of public service in the course of providing legal representation to a private client that makes Dean Wade's comments in this area particularly interesting. He saw private practice as a form of public service, as long as the private work was done with respect for the larger picture.[79] Thus, providing service to a client, while abiding by the highest of ethical standards as set by the profession, would necessarily lead the lawyer into broader fields of public service.[80]

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obligation to partake in what might be considered routine civic functions such as voting, serving on juries, and being active in the community. *Public Responsibilities*, *supra* note 70, at 135.

[76] *Public Responsibilities*, *supra* note 70, at 131.

[77] *See Public Responsibilities*, *supra* note 70, at 136-37.

[78] Smedley, *supra* note 61.

[79] *Public Responsibilities*, *supra* note 70, at 133.

[80] *Id.*

When the Vanderbilt Law School building was dedicated in 1963, Dean Wade proposed that the goal of the law school "should be not merely to instruct in the principles of the law but to prepare the whole lawyer, the complete lawyer, the great lawyer . . . ."[81] He commented:

> We want to dedicate it to the cause of better legal education, to the producing of lawyers who will play their part in the affairs of the world of their times - local, national, and international. We want to dedicate it also to the utilization of the whole school for the growth of law to meet adequately the needs of this rapidly changing world, while still retaining a proper sense of continuity.[82]

Dean Wade believed that the "great lawyer" could be produced by training law students to fulfill five functions of a lawyer.[83] These five functions included being a wise counselor, a skilled advocate, a contributor to the improvement of the legal system, an unselfish and courageous leader of public opinion, and a professional willing to answer the call for public service.[84]

A good lawyer should "seek to improve the law not just in order to aid his clients but in order to make it a more effective instrument to meet the general needs of current times."[85]

> [H]e is an incomplete lawyer if he merely attends the needs of his clients. We should seek to arouse in him an interest in the profession and professional organizations so that he will develop the habit of taking part in bar meetings and institutes. We must produce lawyers who feel a responsibility for law reform and modification, who are willing to spend time and effort in seeking to improve the law. Our students should realize that the great judges and lawyers and teachers have almost all had an abiding interest in law improvement.[86]

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[81] *Legal Education*, *supra* note 27, at 161.
[82] *Id.* at 167.
[83] *Id.* at 161.
[84] *Id.*
[85] *Id.* at 165.
[86] *Legal Education*, *supra* note 27, at 161.

Some twenty years later, Justice Sandra Day O'Connor, at the dedication of the new law library, said:

> You at Vanderbilt Law School are the successors to a rich heritage of legal education founded on the assumption that a great lawyer is not only a competent technician, but a driving force in the development of his profession and society. You are justifiedly proud of the "Vanderbilt vision" of the training of lawyers committed to professional and moral excellence.[87]

That "Vanderbilt vision," of course, was largely developed by Dean Wade.[88]

Dean Wade saw the law school's publications as a way to improve the course of instruction at Vanderbilt, but he also saw it as a means for being of service to the bar. By providing publications that were both scholarly and practical, the law school was able to form a strong bond with the state and local bar. His *Foreword* to the first edition of the *Race Relations Law Reporter* stressed his sincere belief "that a useful service will be performed through this medium."[89] Similarly, when the *Race Relations Law Survey* was introduced to replace the earlier journal, he wrote that "[w]ith this initial issue . . . the Vanderbilt University School of Law resumes its public service function in the law reporting field."[90]

Dean Wade's efforts to reach out to the bar garnered him much respect, as reflected in the following account:

> The General Assembly's consideration of the bill enacting the Tennessee Product Liability Act of 1978 was lengthy and, at times, heated. It was the subject of the least three committee hearings. The debate in both chambers of the General Assembly consumed the better part of three legislative days. The

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[87] Sandra Day O'Connor, *Professional Competence and Social Responsibility: Fulfilling the Vanderbilt Vision*, 36 VAND. L. REV. 1, 8 (1983).

[88] *See generally* Smedley, *supra* note 61.

[89] John W. Wade, *By Way of Introduction*, 1 RACE RELATIONS L. RPTR. 1 (1956) [hereinafter *Introduction*]; *see also* John W. Wade, *Foreword*, 6 VAND. L. REV. 971 (1953).

[90] T.A. Smedley & John W. Wade, *Foreword*, 1 RACE RELATIONS L. SURVEY i (1969).

> Senate's consideration of this bill also included a rather rare occurrence. During its debate on this bill, the Senate suspended its rules and permitted Dean John W. Wade of Vanderbilt Law School to enter the chamber to discuss the bill and to answer questions concerning its effect on existing law.[91]
> The lawmakers could have had no better adviser.

SCHOLARSHIP

> The third aspect of a premier law professor, according to Dean Wade, relates to his or her scholarship. He believed that:
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> [A] premier law professor seeks to improve the state of the law. Every law professor should feel this significant responsibility. It is met in many ways, including teaching and relating to the groups listed above. But it is met primarily by writings and lectures, and it is the primary reason why the good law teacher engages in writing. He is looking for legal areas where he can offer helpful ideas. He has the ability to think clearly, logically, and creatively. He also has the ability to write clearly and smoothly, with a constant feeling for the "reader looking over his shoulder."[92]

With four books (some with multiple editions), thirty-eight major articles, twenty-four shorter articles and comments, nineteen published addresses, twenty-three annual surveys, ten book reviews, four book forewords, three model laws, and numerous articles for the *World Book Encyclopedia*, Dean Wade certainly did more than his share in advancing the law.

A common criticism of much legal scholarship is that it is written to satisfy the "publish or perish" demands typically placed on faculty members and not to advance the law or be of assistance to practitioners. Such criticisms can not be made about Dean Wade's works. As a prolific author, he recognized that one who writes in an area "must necessarily assume responsibility for contributing to betterment or aggravation of the

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[91] Bogart v. STP Corp., No. 85-40-II (Tn. Ct. App. July 2, 1985) (William C. Koch, Jr., J., concurring).

[92] *Ruminations*, *supra* note 4, at 1166.

present situation."[93] The duty to write and contribute to the law was, according to Dean Wade, an *ethical* duty of law professors. He stated:

> The law professor who has a true view of the ethical responsibility that he owes to his profession, feels that it impels him to do his best toward improving the state of the law that he teaches. And, whether he finds real pleasure in research and writing or finds it a tedious, even painful, process, he has no difficulty in locating areas of the law in which he can make a valuable contribution.[94]

According to Dean Wade, the law review author "thinks at length about the legal problems he is discussing, speculates on how they should be solved, and sets forth his thoughts and speculations *for the benefit of the reader*."[95]

As a leader in legal education, Dean Wade encouraged others to write practical articles with concrete proposals to resolve the problems that they identified. He posited:

> A law school is a collection of legal scholars. Like the practicing lawyers, they must recognize a public responsibility to devote more time and effort toward promoting the growth of the law and bringing it more nearly in accord with the needs of the times. Law schools must encourage their faculty members to engage in research by affording the necessary funds, the time, and the facilities. The teachers must be ready to engage in constructive research and writing. Writings which point out defects in the law should offer feasible suggestions for its improvement. More law review articles should conclude with a carefully drafted statutory proposal.
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> Leading articles and student notes and comments in the law review constitute one of the most effective means of improving the present state of law. Some schools regard the review as merely an effective teaching device and fail to recognize the direct effect of a good law review in promoting

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[93] *Introduction*, *supra* note 89, at 1.

[94] John W. Wade, *Book Review*, 47 LA. L. REV. 691, 698 (1987) [hereinafter *Book Review*]; *see also Public Responsibilities*, *supra* note 70, at 134.

[95] *Book Review*, *supra* note 94, at 697 (emphasis added).

legal growth.[96]

His care in setting forth his ideas to improve the law caused his writings to be among the most cited and influential law review articles written anywhere.[97]

It is interesting to note that in commenting on the *Race Relations Law Reporter*, Dean Wade commented on the practical implications that it had on pending matters. He wrote:

> [The] *Race Relations Law Reporter* . . . undertakes to collect and make available to interested parties on an impartial basis the primary legal materials in the field of race relations, as well as careful studies on important problems. During the seven years of its existence the *Reporter* has proved its substantial worth in aiding lawyers, judges, and administrators in this highly volatile field. This is a form of institutional research in which the recognized impartiality of a university renders its product useful in immediately pending problems.[98]

Thus, in keeping with his recognition of a duty owed to the profession, Dean Wade believed that "a good law review article on a particular topic can prove much more useful than the discussion in a legal treatise."[99]

In addition to seeing scholarship as a way to be of service to the profession, Dean Wade also recognized that publications were essential to the educational mission of the law school. The development and advancement of legal writing and publication programs were among his primary concerns when he was Dean at Vanderbilt. He recognized the educational value of law re-

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[96] *Legal Education*, *supra* note 27, at 165-66 (footnote omitted).

[97] In 1973, Dean Wade published an article in the *Mississippi Law Journal* proposing a new development in the application of product liability. John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 836-38 (1973). He identified problems surrounding the terminologies of "defective condition" and "unreasonably dangerous" in § 402A of the Second Restatement of Torts and set forth his new risk/utility doctrine. The doctrine has evolved into one of great importance, and the article was one of the most influential ever to appear in this *Journal*.

[98] *Legal Education*, *supra* note 27, at 166.

[99] *Book Review*, *supra* note 70, at 697-98.

view research and writing and led the effort to improve Vanderbilt's publications. The reputation of the publications, in turn, constituted a major component in the advancement of the law school's reputation throughout the nation

CONCLUSION

Probably every person involved in legal education is aware of the three standard requirements of the profession: teaching, service, and scholarship. Too often, we see these requirements as being in conflict with one another and competing for our time. It is easy to explain a lack of publication by referring to extra committee work or concentration on classwork. Service is dismissed because we are too busy writing. Even teaching can be shoved aside when other matters seem to be of more importance.

John Wade was way ahead of us. He saw relationships between these areas. Good writing provides a needed service to the profession and keeps the professor abreast of current developments, thereby directly impacting the quality of teaching. Service to the profession requires knowledge of current developments, which necessarily impacts on the quality of classroom instruction. Moreover, professors are often best able to be of service through their writing.

Teaching law well requires the professor to write and to serve the profession. As Dean Wade noted, "In these times of rapid change, the law schools and their faculties must themselves play an important part. They cannot instill a sense of public responsibility in their graduates unless they recognize and meet the same responsibility themselves."[100]

Dean Wade met these responsibilities with vigor and determination.

Lawyer, teacher, and scholar, John Wade had great success in each role, and he continued pressing on long after others would have slowed down. All of us, whether in private practice, legal instruction, or public service, would do well to emulate

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[100] *Legal Education*, *supra* note 27, at 166.

the fine example he set and to learn from the writings he left behind. As Justice O'Conner stated in 1983, "[I]f lawyers are to serve their clients with the professional competence that those clients expect and deserve, while at the same time serving the needs of an ever more complex society and world, the . . . vision espoused by John Wade must become a reality for our profession as a whole."[101]

John Wade's "signature was his integrity - as a man of grace and humility, as one of God's toilers in the vineyard. He had drawn from his earlier years as an adolescent, student, and law professor in Oxford, Mississippi, the richest and most admirable dimensions of Southern culture and values."[102]

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[101] O'Connor, *supra* note 87, at 2.
[102] Costonis, *supra* note 21, at 2.

DEAN JOHN WADE AND THE LAW OF TORTS

Gary Myers[*]

Dean John Wade's death last year ends the career of a great scholar, teacher, and administrator. His many accomplishments and his impressive personal traits have been duly praised and chronicled. His legacy includes an impressive body of scholarly work, many former students trained in the ways of the law, and institutions that are better for his walking their hallways. This article focuses on one particular aspect of Dean Wade's contribution—his impact on the law of torts.

Dean Wade's influence on tort law is extensive and enduring. His importance can be measured in a variety of ways, both quantitative and qualitative. For example, Dean Wade had a hand in writing three casebooks, one of which is the leading text in the field of torts, *Cases and Materials on Torts*.[1] This book has aided hundreds of torts teachers and almost one million law students[2] in understanding this fundamental field of law. Dean Wade was involved in preparing the fifth edition some twenty-five years ago, and his involvement continued until the ninth edition, which was published in 1994. For more than a decade, he worked as Reporter for the Restatement (Second) of Torts. He wrote approximately thirty-

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[1] WILLIAM L. PROSSER & JOHN W. WADE, CASES AND MATERIALS ON TORTS (9th ed. 1994).

[2] Michael D. Green, *The Schizophrenia of Risk-Benefit Analysis in Design Defect Litigation*, 48 VAND. L. REV. 609, 610 (1995).

five full-length articles and some forty-five shorter pieces—many, though not all of them, on the subject of tort law. He delivered numerous addresses, many of which were published. He also assumed the role of an advocate, presenting his views on torts and attempting to move the law in directions he perceived as more desirable.

Of course, many law professors ably compile substantial publication lists during their careers, but Dean Wade and his work stand out in this crowd of academics and their writings because of his powerful influence in shaping tort law. His work was of interest not only to scholars but also to courts, legislatures, and practicing attorneys. His work dramatically affected the direction that tort law has taken in the last several decades.

In reviewing Dean Wade's work, a distinct pattern emerges: Dean Wade was a great compromiser[3] who believed in balancing an array of societal interests in order to arrive at a just rule of law. He avoided strict categorical rules in tort law regardless of whether they imposed greater liability on defendants or left plaintiffs with no recovery. He effectively advocated legal rules that took into account the interests of plaintiffs, defendants, consumers, and society as a whole. He criticized technical rules and distinctions, particularly those which confused juries. The tort rules Dean Wade advocated influenced many jurisdictions. This is reflected by the affirmation of many courts and policy-makers of Wade's tort theories.

One of Dean Wade's greatest contributions to the field of tort law is the risk-utility test for analyzing design defects in product liability cases. His path-breaking work on this topic, entitled *On the Nature of Strict Tort Liability for Products* and published in this journal, was a major step in the reformation of this area of the law.[4] This ambitious article, incidentally,

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[3] Robert E. Keeton, *Restating Strict Liability and Nuisance*, 48 VAND. L. REV. 595, 607 (1995) ("John Wade, distinctively, was the most persistent among the group in searching for common ground that would enable us to reach recommendations acceptable not only to Bill Prosser as reporter but also, in due course, to the council and the [American Law] Institute.").

[4] John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS.

may be the most widely-cited article ever published in the *Mississippi Law Journal*.[5] Professor Michael Green recently stated that, "While most of the courts and commentators were attempting to understand and unravel the vagaries of this new world of liability, Dean Wade published an article about strict liability that was a tour de force."[6] This article identified what have become known as the three familiar categories of products liability claims: manufacturing defects, design defects and failure to warn.[7]

In addition to providing an analytical framework for strict liability, Dean Wade offered a seven-factor test for determining whether a product is unreasonably dangerous for purposes of strict tort liability. Dean Wade introduced the now familiar factors as follows:

> If there is agreement that the determination of whether a product is unreasonably dangerous, or is not duly safe, involves the necessary application of a standard, it will, like the determination of negligence or of strict liability for an abnormally dangerous activity, require the consideration and weighing of a number of factors. I offer here a revised list of factors which seem to me to be of significance in applying the standard:
>
> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or

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L.J. 825 (1973).

[5] Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 662-63 & n.158 (1995) (discussing "much cited article" and noting extensive number of references to article in *Shepard's Law Review Citations*).

[6] Green, *supra* note 2, at 611.

[7] Wade, *supra* note 4, at 841-42.

making it too expensive to maintain utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.[8]

Dean Wade's risk-utility test now is the majority rule in design defect cases.[9] Even a cursory sampling of the cases that cite, discuss, and adopt the analysis include numerous decisions.[10] As Professor Marshall Shapo posited, the test "has been quoted over and over by the courts."[11] The drafters of the Restatement (Third) of Torts also have adopted it.[12] The Supreme Court of Mississippi joined this growing trend by explicitly

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[8] *Id.* at 837-38.

[9] *See* Shapo, *supra* note 5, at 666 (stating, "The reporters [for the Restatement] argue forthrightly that 'an overwhelming majority of American jurisdictions rely on risk-utility balancing in design cases.'" (quoting RESTATEMENT (THIRD) OF TORTS § 2 cmt. c (Tentative Draft No. 1, 1994))). Shapo disputes the contention that the risk-utility test has been adopted unequivocally, noting that some of the decisions "leave considerable room for interpretation." *Id.* Nonetheless, the risk-utility test's wide endorsement and discussion, as well as its status as the majority rule in products liability cases, cannot be doubted.

[10] *See, e.g.*, Nowak v. Faberge USA, Inc., 32 F.3d 755, 759 (3d Cir. 1994) (applying Pennsylvania law); Whitehead v. St. Joe Lead Co., 729 F.2d 238, 244-45 (3d Cir. 1984) (applying New Jersey law); Williams v. Brasea, Inc., 497 F.2d 67, 79 (5th Cir. 1974) (applying maritime law), *modified per curiam*, 513 F.2d 301 (5th Cir. 1975), *and cert. denied*, 423 U.S. 906 (1975), *and cert. denied sub nom.* Brasea, Inc. v. Bendes Welding & Mach. Co., 423 U.S. 906 (1975); Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 883 (Alaska 1979); Dart v. Wiebe Mfg., Inc., 709 P.2d 876, 878-80 (Ariz. 1985) (en banc); Duran v. General Motors Corp., 688 P.2d 779, 785 (N.M. Ct. App. 1983), *cert. quashed*, 685 P.2d 963 (N.M. 1984), *and overruled by* Brooks v. Beech Aircraft Corp. 1995 WL 504785 (N.M. June 28, 1995); Cremeans v. International Harvester Co., 452 N.E.2d 1281, 1284 (Ohio 1983).

[11] Shapo, *supra* note 5, at 663.

[12] RESTATEMENT (THIRD) OF TORTS, § 2 cmt. c (Tentative Draft No. 2, 1995). *See generally* Shapo, *supra* note 5, at 661 (discussing drafters' adoption of risk-utility test).

adopting Dean Wade's risk-utility test in *Sperry-New Holland v. Prestage*.[13]

Dean Wade's risk-utility test is not only popular, but wise. It avoids the rigidity of the consumer expectations test, an alternative standard which can either inappropriately impose or bar liability in certain cases. For example, the consumer expectations test would point toward liability for a highly useful product that presented a low but unavoidable risk of which consumers were not aware. Under the risk-utility test, however, the defendant would have a much stronger argument against liability for such products. Similarly, the consumer expectations test can preclude liability in cases in which liability arguably should be imposed. This often seems to occur as a result of the "open and obvious hazard" defense, a frequently applied aspect of the consumer expectations test. This defense would seem to bar recovery regardless of the ease of avoiding the danger through redesign or the difficulty of the plaintiff reducing his or her risk when the product possessed an open and obvious hazard. For example, a worker who could avoid injury from an "open and obvious" workplace hazard by seeking employment elsewhere could be denied damages if the employer asserted this defense and the court accepted it.[14]

Thus, the wisdom of the risk-utility test is that it avoids arbitrary or undesirable results by taking into account a sufficient number of factors. The test recognizes that all products present some risks and that some of those risks cannot be avoided. It recognizes that some products are so useful that no one could contend that the product should be redesigned or pulled from the market to avoid the risks involved. On the other hand, the test imposes liability when the product presents too great a risk given its utility or the availability of feasible alternative designs. Thus, the risk-utility test is a prime

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[13] 617 So. 2d 248, 256 (Miss. 1993); *see also* Satcher v. Honda Motor Co., 52 F.3d 1311, 1313-15 (5th Cir. 1995) (discussing Mississippi's adoption of the risk-utility test).

[14] *See* Shapo, *supra* note 5, at 681 (citing Micallef v. Mirhle Co., 348 N.E.2d 571, 577 (N.Y. 1976) (rejecting open and obvious hazard defense in case of workplace injury)).

example of Dean Wade's balancing approach in the law of torts.[15] As Professor Green also observed, Wade's ideas in this area of law now seem familiar but they were paradigm-shaking when Dean Wade first discussed them more than twenty years ago.[16] In one article Dean Wade explains the rationales for the imposition of strict liability and neatly sums up the principal arguments:

> It is often difficult, or even impossible, to prove negligence on the part of the manufacturer or supplier. True, res ipsa loquitur often comes to the aid of the injured party. But it is normally regarded as a form of circumstantial evidence, and this means that there must be a logical inference of negligence which is sufficiently strong to let the case go to the jury. This often is not present, and strict liability eliminates the need of the proof. A second reason is suggested by the phrase "spread the risk." The idea is that the loss should not be allowed to remain with the injured party on whom it fortuitously fell, but should be transferred to the manufacturer who, by pricing his product, can spread it among all the consumers. The extent to which a manufacturer, may be free to "spread the risk" created by his product can be the subject of some debate. A different way of expressing essentially the same idea is to say that the activity of making the particular product should pay its own way, that the enterprise should bear the liability. Also similar is the argument regarding availability of insurance. That type of first-party insurance for automobile accidents, which is sometimes called no-fault insurance, is less available here, since the injured party would need to take out accident insurance in general; on the other hand, the manufacturer can more easily obtain appropriate liability insurance coverage. Another argument involves the deterrent effect. Experience seems to demonstrate that if a manufacturer knows he will be held liable for injuries inflicted by his product, that the product will be safer than if he understands that he can avoid liability by demonstrating the exercise of due

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[15] *See* Wade, *supra* note 4, at 835 n.36, 837 n.41 (recognizing that balancing test was similar in spirit to other multi-factor tests used in tort law, such as tests for ultrahazardous activity and negligence).

[16] Green, *supra* note 2, at 613.

> care. There is also no good analogy to automobile accidents here, since a driver who is not deterred by thought of injury to himself is hardly likely to be deterred by the thought of financial loss, especially if it would be covered by insurance.[17]

Dean Wade persuasively illustrated that strict liability does not make the seller an insurer of its product:

> Strict liability for products is clearly not that of the insurer. Thus, the manufacturer of a match would be liable for anything burned by a fire started by a match produced by him, an automobile manufacturer would be liable for all damages produced by the car, a gun maker would be liable to anyone shot by the gun, anyone cut by a knife could sue the maker, and a purchaser of food with high calories would have an action for his overweight condition and for an ensuing heart attack.[18]

He noted the need for limits on both the existence of strict liability and its scope, as constrained by the concepts of proximate cause and plaintiff's fault.[19] He attacked the formalisms and complications of warranty-based notions of strict liability.[20] He explained why the jury should not be given an instruction containing the risk-utility factors he proposed, an argument worth reading although it may not be entirely persuasive.[21]

Another area of tort law in which Dean Wade advocated balancing tests is the subject of comparative negligence. He authored the Uniform Comparative Fault Act,[22] wrote a number of articles on comparative negligence, and successfully

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[17] Wade, *supra* note 4, at 826.

[18] *Id.* at 828 (footnote omitted).

[19] *Id.*

[20] *Id.* at 834.; *see also infra* notes 27-30, 32 and accompanying text.

[21] Wade, *supra* note 4, at 838-41.

[22] Unif. Comparative Fault Act §§ 1-11, 12 U.L.A. 43 (West Supp. 1995). Although this uniform act has not been widely adopted, it has been praised. *See* Green, *supra* note 2, at 610 (noting that "model statute . . . contains so much wisdom that it borders on criminal that more states have not adopted it as their own" and observing that two states have adopted it).

persuaded the Supreme Court of Tennessee to adopt the doctrine of comparative negligence, a rejection of many years of precedent in Dean Wade's adopted home state.[23]

Dean Wade often criticized the traditional common law approach in this area: "The common law was long beset by the all-or-nothing approach that differentiated it from equity. It would be a step backward, I think, to return to it."[24] Under the common law, if a plaintiff was found to be even partly at fault, his or her contributory negligence was a complete and total bar to recovery. Wade preferred the malleable rule of comparative negligence, which weighs the relative fault of the plaintiff and the defendant. More particularly, he advocated the doctrine of pure comparative negligence, which allocates damages based on the fact-finder's determination of relative fault. He disliked what he saw as the arbitrariness of modified comparative negligence rules, under which plaintiffs recover only if their percentage of relative fault is less than fifty-one or fifty percent.[25]

In addition to dealing with comparative negligence rules, Dean Wade proposed in the Uniform Comparative Fault Act a system for joint and several liability and contribution among tortfeasors. In this Act, Dean Wade grappled with the problem of the insolvent tortfeasor. Suppose there are two negligent

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[23] Dean Wade often advocated adoption of the pure comparative negligence rule, which he sought to persuade Tennessee to adopt. *See* John W. Wade et. al., *Comparative Fault in Tennessee Tort Actions: Past, Present and Future*, 41 TENN. L. REV. 423, 459-60 (1974) (advocating adoption of pure comparative negligence in Tennessee). The Supreme Court of Tennessee eventually adopted this position in 1992. *See* McIntyre v. Balentine, 833 S.W.2d 52, 56 (Tenn. 1992) (abandoning outdated common law doctrine of contributory negligence).

[24] John W. Wade, *Essays on Torts*, 47 LA. L. REV. 691, 695 n.17 (1987); *see also* John W. Wade, *Comparative Negligence—Its Development in the United States and its Present Status in Louisiana*, 40 LA. L. REV. 299, 299-307 (1980) (discussing development of comparative negligence).

[25] *See* John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors be Abolished?*, 10 AM. J. TRIAL ADVOC. 193, 205 (1986) [hereinafter *Joint and Several Liability*] (analyzing problems with joint and several liability); *see also* Wade, *supra* note 23, at 459-60 (advocating adoption of pure comparative negligence in Tennessee); Wade, *supra* note 4, at 250 (espousing pure comparative negligence).

tortfeasors, Ann and Bob. The jury finds that Ann's comparative fault was forty percent, Bob's was also forty percent, and the plaintiff was twenty percent at fault. Normally, under the pure comparative negligence rule, the plaintiff would thus receive eighty percent of the total harm caused, forty percent from each defendant. But what if Bob is insolvent? Who bears the loss? Under Dean Wade's proposal, the insolvent defendant's share is reallocated among the remaining parties who are at fault, including the plaintiff if the plaintiff was found partly at fault.[26] Thus, Ann would pay two-thirds of Bob's share of the damages, while the plaintiff would bear one-third of it. In the end, Ann would pay 66.7 percent (forty percent plus twenty-six and two-thirds) of the total damages suffered by the plaintiff. This solution avoids the harsh results that would occur by either making the other joint tortfeasor fully liable (which would mean Ann would bear eighty percent of the loss though she was only forty percent at fault) or making the plaintiff bear that loss. Once again, Dean Wade takes the middle ground, which seems to ameliorate the effects that absolute rules would have in real-life situations.

Dean Wade's balancing approach is also evident in his contributions to nuisance law. This point was articulated by Judge Robert Keeton:

> The principal section on nuisance, as it emerged from all the consultation and debate of the 1970s, reflects a judgment of the Institute consistent with John Wade's recommendation for a multi-factor evaluative standard. Perhaps it is a correct observation also that judicial decisions of the latter half of the twentieth century have moved farther than had decisions of earlier vintage toward reliance on evaluative standards in

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[26] *Joint and Several Liability*, *supra* note 25, at 206; *see also* David R. Smith & John W. Wade, *Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts*, 17 IND. L. REV. 969, 973-96 (1984) (discussing balancing approach of Uniform Act); John W. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 577-80 (1980) (discussing proportional allocation of loss); John W. Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 374-91 (1978) (discussing Uniform Act).

areas where policy arguments founded on highly-valued interests can be invoked by each set of opposing advocates.[27]

Other Wade articles apply his balancing approach to tort rules governing frivolous litigation,[28] to the subjects of defamation and privacy law,[29] and to a proposed tort for insulting or abusive language.[30] One of his most important articles, again on the subject of products liability, dealt with the question of determining when a manufacturer's knowledge should be measured—at the time of distribution of the allegedly defective product or at the time of trial.[31] His suggestions for addressing this difficult issue reflected his balancing approach which required, for example, that a manufacturer that asserts its lack of knowledge of information known at the time of trial had the burden of proving that this fact was not known at the time it sold the product.[32]

Dean Wade's writings on tort law display a remarkable understanding of the field, one drawn from many years of reflection. He recognized, for example, that negligence law could have evolved to deal with many of the situations currently addressed by strict liability.[33]

In addition to advocating tort rules and doctrines that balanced many conflicting interests, Dean Wade criticized tort rules that were unduly technical and distinctions that were

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[27] Keeton, *supra* note 3, at 605 (discussing RESTATEMENT (SECOND) OF TORTS).

[28] John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 434 (1986) (suggesting balancing approach).

[29] John W. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1122 (1962) (suggesting balancing approach to defamation law).

[30] John W. Wade, *Tort Liability For Abusive and Insulting Language*, 4 VAND. L. REV. 63, 115 (1950).

[31] John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 735 (1983).

[32] *Id.* at 760-61. Dean Wade's version of the risk-utility test generally focuses on the state of knowledge at the time of distribution, as distinguished from Dean Keeton's emphasis on the information available at the time of trial. *See* Page Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 569-71 (1969).

[33] Wade, *supra* note 4, at 850.

without a difference. He disliked rules that juries could not understand. Hence his simplified statement of the strict liability rule which reads in pertinent part:

> "A [product] is not duly safe if it is so likely to be harmful to persons [or property] that a reasonable prudent manufacturer [supplier], who had actual knowledge of its harmful characters would not place it on the market. It is not necessary to find that this defendant had knowledge of the harmful character of the [product] in order to determine that it was not duly safe."[34]

Hence his proposal that the overlapping claims of negligence, warranty, and strict liability be melded into one.[35] Hence his dislike for some of the arcane distinctions between libel and slander, including the "special damages" rule.[36]

One of the few areas in which Dean Wade seemed to abdicate his centrist role was in the area of tort reform. He had few positive words on the topic, referring to the proposals as "special-interest legislation" resulting from "an intensive, lavishly financed campaign to persuade the legislatures and the general public."[37] He believed that tort reform measures were "primarily for the benefit of insurance companies."[38] Interestingly, although he sometimes favored the concept of uniformity of state laws in the area of products liability,[39] he disavowed it when tort reform became a possibility on the federal level.[40] Al-

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[34] *See id.* at 839-40.

[35] *Id.* at 849-50; *see also* John W. Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.*, 48 MO. L. REV. 1, 27 (1983) [hereinafter *Tort Liability*].

[36] John W. Wade, *The Communicative Torts and the First Amendment*, 48 MISS. L.J. 671, 711 (1977).

[37] *Joint and Several Liability*, *supra* note 25, at 207; *see* John W. Wade, *Strict Product Liability: A Look at Its Evolution*, 19 THE BRIEF 8, 56 (1989) (asserting that reform provisions sought to change both statutory and common law).

[38] Wade, *supra* note 26, at 209.

[39] John W. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 576 (1980); *see also Tort Liability*, *supra* note 35, at 27-28 (suggesting that greater simplicity of law could be beneficial).

[40] *See generally* John W. Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 HOUS. L. REV. 81 (1987) (suggesting that substantive provi-

though his arguments in this area may not be as convincing as his position on other issues, his expertise in this field has provided valuable insight. For example, Dean Wade produced compelling evidence rebutting the mythical "litigation explosion" believed to be taking place in American courts today.[41]

As this survey of Dean Wade's contributions to tort law indicates, his influence in the field has been powerful. Dean Wade's pragmatic approach has held the day on many hotly-contested tort issues. Roger Traynor made a noteworthy comment to Wade shortly after the 1963 decision in *Greenman v. Yuba Products Co.*,[42] a case in which California adopted strict liability. "Judge Traynor confided in me that he expected strict liability for products to simplify trials so much that there would be no reason to write further in the field of torts. He advised me to write on the subject of restitution instead."[43]

Fortunately, although Dean Wade heeded the call to write on restitution, he also ignored Traynor's guidance on the subject of torts.

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sions of proposed federal tort laws have become far too detailed and have favored defendants).

[41] Wade, *supra* note 40, at 95-96.

[42] 377 P.2d 897 (Cal. 1963).

[43] Wade, *supra* note 40, at 83.

TAKING ISSUE WITH ISSUE PRECLUSION: REINVENTING COLLATERAL ESTOPPEL

Eli J. Richardson[*]

I. INTRODUCTION

Collateral estoppel, also known as issue preclusion,[1] is one of the most venerable doctrines in Anglo-American law.[2] Far from a mere historical relic, however, collateral estoppel is a frequent role player in modern American litigation. This is not surprising, given that the doctrine's ultimate objective—reducing litigation—is more compelling today than ever before.[3]

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[1] *See, e.g.*, Leach v. Braswell, 804 F. Supp. 1551, 1555 (S.D. Ga. 1992) (stating that "collateral estoppel refers to issue preclusion"); 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4416, at 136 (1981) (noting that "issue preclusion" is modern term for collateral estoppel). For an examination of the development of the terminology for this doctrine, see 1B JAMES W. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.441[1] (2d ed. 1995) text accompanying nn. 9-10.

[2] *See* Montana v. United States, 440 U.S. 147, 153 (1979) (stating that collateral estoppel embodies "a fundamental precept of common-law adjudication"); Ashe v. Swenson, 397 U.S. 436, 443 (1970) ("'Collateral estoppel' . . . stands for an extremely important principle in our adversary system of justice. . . . Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law [for more than] . . . 50 years."); James v. American Int'l Recovery, Inc., 799 F. Supp. 1156, 1181 (N.D. Ga. 1992) (noting "the courts' well established and longtime adherence to notions of res judicata and collateral estoppel").

[3] Excessive litigation is becoming a greater concern with each passing year, especially in federal courts. "Unless steps are taken now, the courts face a grim future marked by overburdened judges, diminished budgets, crumbling courthouses and dockets clogged with criminal cases." Henry J. Reske, *Long Range Plan Would Cut Federal Cases*, A.B.A. J., Feb. 1995, at 22, 22; *see also* Leonard I.

Collateral estoppel is also an appealing doctrine, because ostensibly it is predictable and easy to apply. Under current articulations of the doctrine, collateral estoppel seemingly is defined in terms of a few concise elements.[4] If those elements exist, collateral estoppel presumptively applies; otherwise, it does not apply.

In reality, however, courts and scholars have created a collateral estoppel jurisprudence that is anything but predictable and easy to apply.[5] That jurisprudence is marked by four deficiencies which render analysis unpredictable and confusing.

First, courts frame and address collateral estoppel issues improperly; that is, in a manner oblivious to the real preclusive effect of collateral estoppel.[6] Second, the body of rules which courts generally use to adjudicate collateral estoppel issues is marred by a vexing interplay between the various individual rules. The rules necessitate too many layers of analysis.[7] Moreover, the identity of the applicable rule often is not ascertainable, because courts within the same jurisdiction

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Garth, *How to Appeal to an Appellate Judge*, LITIG., Fall 1994, at 20, 20 ("[E]ach federal court of appeals judge is confronted annually with an overwhelming caseload that keeps growing—and growing—and growing.").

[4] *See infra* notes 33-40 and accompanying text (discussing elements of collateral estoppel); *see also infra* notes 60-61 and accompanying text (noting that elements of collateral estoppel are commonly regarded as sole component of collateral estoppel jurisprudence).

[5] For the sake of consistency, and due to the relative familiarity and importance of federal courts and federal law, this Article cites opinions from federal courts exclusively. Nevertheless, this author's critique and suggested reform of the prevailing collateral estoppel methodology is pertinent to state as well as federal collateral estoppel law.

Collateral estoppel is one of many areas in which legal scholars have helped shape courts' decisions. In particular, the RESTATEMENT OF JUDGMENTS and RESTATEMENT (SECOND) OF JUDGMENTS, published by the American Law Institute, have been very influential in the collateral estoppel area. *See, e.g.*, 1B MOORE & LUCAS, *supra* note 1, ¶ 0.441[3.-4] (assuming that Restatement is "representative of wide-spread current thinking" regarding aspect of collateral estoppel law). Accordingly, this Article intermittently refers to rules and observations derived from the second Restatement as well as from federal courts.

[6] *See infra* notes 53-59 and accompanying text.

[7] *See infra* text accompanying notes 94-100.

apply different versions of the same type of rule.[8] Thus, some rules effectively undermine the reliability and authoritativeness of other rules.[9]

Third, many collateral estoppel rules individually are problematic. Courts commonly phrase collateral estoppel rules in ambiguous terms[10] that mandate meaningless exercises in verbal categorization.[11]

Fourth, courts often ignore these rules, choosing to decide collateral estoppel issues based on other considerations.[12] Such departure from the rules only adds to the uncertainty and confusion engendered by the rules themselves.

In short, the interplay and substance of existing rules, as well as courts' application of them, render collateral estoppel analysis confusing and unpredictable. Collateral estoppel's body of black-letter rules therefore completely fails to serve the very purpose of black-letter rules, namely, clarity and predictability.[13]

The prevailing lack of clarity creates two undesirable practical consequences. First, lawyers must spend more time researching collateral estoppel law and analyzing collateral estoppel issues, thereby increasing costs for clients.[14] Second, courts must spend more time wrestling with collateral estoppel issues, thereby consuming scarce judicial resources.[15]

Ironically, some of the very practices that mar courts' current approaches also are indicative of a better approach. Much of the current confusion results from courts' tendency to twist or even ignore their own rules in order to make decisions based on judgment calls as to whether preclusion makes good

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[8] *See infra* notes 62-68 and accompanying text.

[9] *See infra* text accompanying notes 69-93.

[10] *See infra* text accompanying notes 102-26.

[11] *See infra* notes 161-69 and accompanying text; *see also infra* text accompanying note 201.

[12] *See infra* text accompanying notes 130-34.

[13] *See infra* notes 35-37 and accompanying text (discussing purpose of black-letter collateral estoppel test); *infra* text accompanying notes 50-134 (arguing that collateral estoppel's black-letter rules fail to foster predictability and clarity).

[14] *See infra* text accompanying notes 135-44.

[15] *See infra* text accompanying notes 145-47.

sense in light of all relevant circumstances.[16] In a regime based on black-letter rules, such a practice is indefensible because it undermines those rules and defeats the regime's goal of predictability. However, in the absence of black-letter rules, it makes perfect sense for a court to decide whether to apply collateral estoppel based on its subjective judgment as to whether it *should* apply collateral estoppel.[17]

In light of the troubled state of current collateral estoppel law, as well as the potential for a more sensible approach, this Article proposes to replace the current approach with a new two-prong methodology. The first step ensures that, contrary to the present practice, courts properly phrase collateral estoppel issues. Under the first prong, the court phrases the inquiry in terms of the *proposition*, rather than the *issue*, potentially precluded. Instead of asking whether relitigation of an issue is precluded, the court frames the issue as follows: should the party be estopped from asserting or denying the proposition that the opposing litigant seeks to preclude?[18] The issue is framed in this manner because lawsuits turn upon what propositions the parties are able to establish, not what issues parties can relitigate.[19]

Under the second prong, the court answers the question as properly framed. The court flexibly decides whether, based on all relevant circumstances, the party opposing collateral estoppel should be precluded from establishing or denying the proposition at issue.[20] In so deciding, the court considers numerous factors indicative of whether preclusion would be fair, faithful to the objectives of collateral estoppel, or otherwise appropriate. Whereas the current approach prescribes several prerequisites to the application of collateral estoppel, the proposed approach contains no absolute requirements and instead allows the court to ascribe to each factor as much weight as it

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[16] *See infra* notes 154-69 and accompanying text; *infra* notes 171-80 and accompanying text.

[17] *See infra* text accompanying notes 184-85.

[18] *See infra* text accompanying notes 151-52.

[19] *See infra* notes 50-59 and accompanying text.

[20] *See infra* text accompanying notes 170-204.

deems appropriate.

The proposed approach eliminates all deficiencies of the substance and structure of existing rules and courts' manner of applying them. Under the proposed approach, courts need not decide whether the facts of a given case can be crammed within the vague and impertinent verbal formulations of black-letter rules. Moreover, a court would not have to confuse the proper meaning and application of its own purported rules in order to reach what it considers a proper result. Finally, the flexible multi-factor inquiry would foster no more unpredictability than does the current approach.[21]

The proposed approach is simple, efficient and focused directly on the policy considerations driving the law of collateral estoppel. Accordingly, it would save lawyers and courts a great deal of time in researching and addressing collateral estoppel issues, thereby benefiting lawyers' clientele and the public at large. More importantly, it would simplify courts' efforts to effectuate the objectives underlying the law of collateral estoppel.

II. Background of Collateral Estoppel

To understand the problems plaguing the law of collateral estoppel, it is helpful to review the background of the doctrine.

A. The Purpose of Collateral Estoppel Law

The established common-law doctrine of collateral estoppel serves several purposes.[22] Specifically, collateral estoppel is intended to accomplish the following: conserve judicial resources,[23] preserve "the integrity of the court" by preventing

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[21] *See infra* text accompanying notes 215-16.

[22] *See supra* note 2.

[23] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (stating that collateral estoppel serves "purpose of promoting judicial economy"); United States v. Shanbaum, 10 F.3d 305, 311 (5th Cir. 1994) (providing that collateral estoppel promotes judicial economy); Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1220 (6th Cir. 1990) (stating "collateral estoppel conserves judicial resources"); A.J. Taft Coal Co. v. Connors, 829 F.2d 1577, 1581 (11th Cir. 1987) ("One of the goals underlying the doctrine of collateral estoppel is to preclude . . . waste of judicial

inconsistent resolution of issues,[24] promote "finality of judgments,"[25] protect defendants from repetitive litigation,[26] ensure that a winning "party should not have to fight anew a battle it has already won,"[27] and promote "conclusive resolution of disputes."[28] Although articulated differently, these objectives often overlap one another and have much in common. Each constitutes either a consequence or a cause of reduced litigation, which may be considered the general objective of collateral estoppel.

Since it would be inappropriate to achieve this objective by precluding *all* litigation, collateral estoppel does not apply in every case. Rather, in determining which matters should be subject to collateral estoppel, the doctrine's objective of reducing litigation must be balanced against countervailing considerations, namely, the public's or litigant's legitimate interest in having matters litigated.[29] The purpose of the *law of collateral estoppel*, as distinguished from the purposes of *collateral estoppel* listed above,[30] is to derive from this balancing pro-

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resources.").

[24] *Teledyne Indus., Inc.*, 911 F.2d at 1220.

[25] Beck v. Levering, 947 F.2d 639, 642 (2nd Cir. 1991), *cert. denied sub nom.* Levy v. Martin, 504 U.S. 909 (1992).

[26] *See Parklane Hosiery*, 439 U.S. at 326 (setting forth proposition that collateral estoppel serves "purpose of protecting litigants from burden of relitigating an identical issue with same party or his privy"); North Ga. Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429, 438 (11th Cir. 1993) (opining that "[t]he doctrine of collateral estoppel fulfills an important policy of permitting defendants repose on issues already litigated").

[27] United States v. Blue Cross Blue Shield, Inc., 755 F. Supp. 1040, 1046 (S.D. Ga. 1990) (citing United States v. Stauffer Chem. Co., 464 U.S. 165, 171 (1984)).

[28] Montana v. United States, 440 U.S. 147, 153 (1979).

[29] *See, e.g.*, In re Weeks, 133 B.R. 201, 204 (Bankr. W.D. Tenn. 1991) (stating that policies underlying issue preclusion can be overcome by equally important policies); RESTATEMENT (SECOND) OF JUDGMENTS 249 (1980) ("There are a number of instances in which the policies against relitigation of an issue may be overcome.").

[30] Collateral estoppel is the rule that, under certain conditions, the estopped party is precluded from raising specific matters. To refer to the purpose of collateral estoppel, therefore, is to refer to the purpose of precluding the estopped party from raising those specific matters.

By contrast, as used in this Article, the "law of collateral estoppel" or "collat-

cess the conditions under which courts can appropriately apply collateral estoppel.[31] In other words, the doctrine of collateral estoppel reduces litigation; collateral estoppel law prescribes when the doctrine should be applied.

B. Elements of Collateral Estoppel: The Collateral Estoppel Test

Courts use multi-element or multi-requirement tests to determine whether they can apply collateral estoppel in a given case.[32] In theory, these tests reflect the circumstances under which it is appropriate to apply collateral estoppel in order to achieve the goal of reduced litigation.[33] In other words, these tests are intended to ensure that the benefits of

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eral estoppel law" refers to the legal principles reflecting the balance struck between the interests weighing in favor of applying collateral estoppel and the interests weighing against applying collateral estoppel. The purpose of collateral estoppel law, therefore, is to properly strike this delicate balance.

[31] "The limitations that bristle from this statement of general issue preclusion requirements reflect an often frustrating conflict between the important values served by this branch of res judicata and the great risks being courted." 18 WRIGHT ET AL., *supra* note 1, § 4416, at 139. The risks created by application of collateral estoppel include the possibility of perpetuating an incorrect decision and the possible encouragement of more, rather than less, litigation. *See id.*

The second Restatement also reveals that the rules of collateral estoppel, individually and collectively, are intended to strike this delicate balance. The second Restatement notes that collateral estoppel principles as a whole must be flexible enough to recognize when collateral estoppel's policies are outweighed by countervailing factors. RESTATEMENT (SECOND) OF JUDGMENTS 249 (1980). Moreover, in explaining the rationale behind individual rules, the second Restatement repeatedly refers to balancing. *See, e.g., id.* § 27 cmt. c (1980) (explaining § 27's rule prescribing issues that are subject to preclusion); *id.* cmt. h (explaining § 27's rule that only determinations on issues "essential" to prior judgment are subject to preclusion); *id.* § 28 cmt. g (explaining § 28(5)'s exception to collateral estoppel when there is need for new determination of issue).

[32] *See, e.g.*, Stahl v. Northern Assurance Co., 716 F. Supp. 626, 629 (M.D. Ga. 1989) (noting that elements are "prerequisites to the application of collateral estoppel"), *aff'd*, 894 F.2d 413 (11th Cir. 1990).

[33] *See* Empire Fire & Marine Ins. Co. v. J. Transport, 880 F.2d 1291, 1295 (11th Cir. 1989) (discussing policy against "redundant litigation"). "In order to effectuate the public policy in favor of minimizing redundant litigation, issue preclusion bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties." Kasper Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535-36 (5th Cir. 1978).

reducing litigation by collateral estoppel exceed the costs.[34]

Courts seldom have discussed the justification for using a multi-requirement test to decide whether they may apply collateral estoppel. For example, courts have not questioned whether some other device, such as a flexible multi-factor inquiry having no absolute requirements, might better resolve the issue. Nevertheless, the rationale behind the multi-element collateral estoppel test occasionally reveals itself. First, there is something simple and predictable in knowing that collateral estoppel is automatically inapplicable if one of its elements is absent.[35] Second, there exists a prevailing belief that certain principles should be considered in every collateral estoppel dispute.[36] Arguably, consideration of these principles is ensured if, in every case, courts look for requirements that supposedly embody those considerations. Third, clear rules in

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[34] *See supra* note 31.

[35] For example, the second Restatement discusses why it is important that collateral estoppel invariably be deemed inapplicable in the absence of its requirement that the prior issue has been actually litigated:

> It is true that it is sometimes difficult to determine whether an issue was actually litigated; even if it was not litigated, the party's reasons for not litigating in the prior action may be such that preclusion would be appropriate. But the policy considerations outlined above weigh strongly in favor of nonpreclusion, and it is in the interest of predictability and simplicity for such a result to obtain uniformly.

RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e (1980).

Similarly, the second Restatement discusses why collateral estoppel invariably should be deemed inapplicable—for lack of the requirement that the prior determination of the issue was necessary to the prior judgment—when the prior judgment was "based on determinations of two issues, either of which standing independently would be sufficient to support the [judgment]. *Id.* cmt. i.

> There may be causes where, despite these considerations, the balance tips in favor of preclusion. . . . But since the question of preclusion will almost always be a close one if each case is to rest on its own particular facts, it is in the interest of predictability and simplicity for the result of nonpreclusion to be uniform.

Id. cmt. i.

[36] For example, in discussing why the second Restatement's multi-element test does not vary with the subject matter of the case involved, the introductory note states, "there are nevertheless discernable principles which can and should be brought to bear on all cases in which a question of issue preclusion is raised." *Id.* at 250 (1980).

the collateral estoppel area would reduce litigation aimed at testing the boundaries of collateral estoppel; such litigation is less likely when those boundaries are black-and-white rather than gray. Thus, to the extent that multi-element tests are clearer than other kinds of rules, they better serve collateral estoppel's objective of reducing litigation.[37]

As set forth more fully below, the collateral estoppel elements vary, both from court to court and from opinion to opinion within the same court.[38] For example, many opinions recite a set of collateral estoppel elements similar to the following:

> (1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.[39]

Other opinions recite a set of elements similar to the following: (1) the issue as to which collateral estoppel is asserted must be identical to an issue in an earlier proceeding; (2) the issue was "actually litigated" in the earlier action; and (3) the determination of the issue must be a "critical and necessary part of the judgment in that earlier action."[40]

These tests allude to several concepts which should be

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[37] "The values of issue preclusion can be served effectively only by clear rules. Uncertain and ambiguous rules invite second litigation in an effort to test the limits of preclusion, impose burdens of administration on courts and parties, and thereby jeopardize the goals of repose and reliance." 18 WRIGHT ET AL., *supra* note 1, § 4416, at 143 (1981).

[38] *See infra* notes 62-67 and accompanying text.

[39] *In re* McWhorter, 887 F.2d 1564, 1566 (11th Cir. 1989) (quoting I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541, 1549 (11th Cir. 1986)).

[40] Walker v. Kerr-McGee Chem. Corp., 793 F. Supp. 688, 694 (N.D. Miss. 1992); United States v. $80,080 In United States Currency, 779 F. Supp. 169, 172-73 (N.D. Ga. 1991). For a somewhat different three-element articulation of the collateral estoppel elements, see Fund for Animals, Inc. v. Lujan, 794 F. Supp. 1015, 1024 (D. Mont. 1991), *aff'd*, 962 F.2d 1391 (9th Cir. 1992).

labeled at this stage to simplify subsequent discussion. First, the party against whom collateral estoppel is asserted will be referred to as the "estopped party" or, in contexts in which it is unsettled whether the court will apply collateral estoppel, the "party to be estopped." Second, the party asserting collateral estoppel will be referred to as the "estopping party." Third, the issue as to which collateral estoppel is asserted will be referred to as the "estopped issue" or, in contexts in which it is unclear whether the court will apply collateral estoppel, the "issue to be estopped." Finally, a set of required elements sometimes will be referred to as a "collateral estoppel test."

C. Exceptions to the Applicability of Collateral Estoppel

Even if the court finds that all collateral estoppel elements are present, it nevertheless might decline to apply collateral estoppel, on one of two grounds. First, the court might invoke a black-letter legal exception to collateral estoppel. Alternatively, the court might make a discretionary decision not to apply the doctrine.

1. Black-letter Exceptions

Courts recognize numerous exceptions to collateral estoppel. When an exception is applicable, the court will refuse to apply collateral estoppel even though the collateral estoppel test has been satisfied.

There are numerous established legal exceptions to collateral estoppel.[41] The Restatement (Second) of Judgments lists five:

> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid

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[41] JOHNATHAN M. LANDERS ET AL., CIVIL PROCEDURE 991 (2d ed. 1988).

> inequitable administration of the laws; or
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.[42]

In addition to embracing the Restatement's exceptions,[43] courts articulate other exceptions. For example, a plaintiff who was not a party to the prior litigation may not assert collateral estoppel against the government.[44]

2. *Judicial Discretion Not to Apply Collateral Estoppel*

Like the legal exceptions, the exercise of judicial discretion might prevent the application of collateral estoppel even when the collateral estoppel test has been satisfied.

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[42] RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1980).

[43] Courts also might invoke an exception corresponding to a Restatement exception, even if they do not cite to the Restatement. *See, e.g.*, North Ga. Elec. Membership v. City of Calhoun, 989 F.2d 429, 433 (11th Cir. 1993) (stating, consistent with second Restatement § 28(2)(b), "that a 'change or development in the controlling legal principles' may sometimes prevent the application of collateral estoppel . . . ." (quoting Commissioner v. Sumnen, 333 U.S. 591, 599 (1948))).

[44] *See, e.g., In re* Burns, 974 F.2d 1064, 1067 (9th Cir. 1992) (holding that nonmutual offensive use of collateral estoppel is unavailable against government).

It is hornbook law that collateral estoppel is to be applied flexibly.[45] Accordingly, courts often state that the decision whether to apply collateral estoppel is committed to the sound discretion of the trial court.[46] Citing this discretion, courts frequently decline to apply collateral estoppel even when all elements are present and no specific legal exception is apposite.[47]

D. The Effect of Collateral Estoppel

If the elements are present and no exception is applicable, and the court does not exercise its discretion not to apply col-

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[45] *E.g.*, Schellong v. INS, 805 F.2d 655, 658 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987).

[46] Klein v. Commissioner, 880 F.2d 260, 264 (10th Cir. 1989) ("Trial courts are granted broad discretion in the application of collateral estoppel."); Dracos v. Hellenic Lines, Ltd., 762 F.2d 348, 353 (4th Cir.) (stating that district court's holding regarding collateral estoppel was not abuse of its broad discretion), *cert. denied*, 474 U.S. 945 (1985); United States *ex. rel.* Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Blue Cross Blue Shield, Inc., 755 F. Supp. 1040, 1046 (S.D. Ga. 1990) ("Collateral estoppel is a *discretionary* doctrine.").

Such statements are somewhat inexact, at least in some circuits. Some appellate courts review de novo, rather than for abuse of discretion, a district court's determination as to whether the collateral estoppel elements are present. *See, e.g.*, United States v. Sandoz Pharmaceuticals Corp., 894 F.2d 825, 826 (6th Cir.) (stating that availability of collateral estoppel is mixed question of law and fact reviewed (de novo), *cert. denied*, 498 U.S. 810 (1990); *In re* McWhorter, 887 F.2d 1564, 1566 (11th Cir. 1989) (stating that question of availability of collateral estoppel is subject to de novo review). In these circuits, therefore, this determination is *not* committed to the sound discretion of the district court. Thus, to the extent that it rejects collateral estoppel based on its finding that the collateral estoppel elements are not present, a district court in these circuits does *not* have broad discretion regarding the application of collateral estoppel. Nor is a district court's decision that it *may* invoke collateral estoppel, because the elements are present, entitled to any deference. *See* McWhorter, 887 F.2d at 1566-68 (reversing district court and employing de novo review because district court improperly found all collateral estoppel elements present).

Even in these circuits, however, the district court does have discretion in one important regard. If the district court *correctly* finds that the collateral estoppel elements are present, it has broad discretion to apply or not apply collateral estoppel. Simply put, in that case, the district court *may*—but need not—apply collateral estoppel. *See* United States *ex rel.* Stinson, 755 F. Supp. at 1046 ("Collateral estoppel is a *discretionary* doctrine. A court is permitted to use collateral estoppel" [when elements exist]) (citations omitted).

[47] District courts rarely cite this discretion in other contexts, since they have less or no discretion in other contexts. *See supra* note 46.

lateral estoppel, the court will apply the doctrine.[48] But what does it mean to say that collateral estoppel is applicable? In other words, what is the preclusive effect of collateral estoppel? According to most judicial opinions, collateral estoppel's preclusive effect is that the estopped party cannot relitigate the precluded issue.[49]

III. Prevalent Flaws in Existing Collateral Estoppel Jurisprudence

For four reasons, contemporary collateral estoppel jurisprudence frustrates the objectives and efficient operation of collateral estoppel law. First, courts frame collateral estoppel issues in a manner incompatible with a correct understanding of the doctrine's preclusive effect. Second, courts necessitate too many layers of analysis by recognizing too many rules which compete with and undermine one another. Third, individual rules are ambiguous and misdirected. Fourth, the applicability of collateral estoppel is always uncertain, because a court might choose not to apply collateral estoppel even if the court's own rules indicate that collateral estoppel is applicable.

A. Misapprehension of Collateral Estoppel's Preclusive Effect and Mischaracterization of Collateral Estoppel Issues

As noted above, courts usually describe collateral estoppel's preclusive effect as follows: collateral estoppel precludes the relitigation of an issue decided in a prior proceeding.[50] This description is accurate insofar as the estopped party indeed is precluded from litigating the estopped issue. However, such a description is also inadequate, because it does not contemplate

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[48] Landers et al. *supra* note 41, at 999 ("If the issue is identical and if the other conditions for preclusion are met, preclusion applies.").

[49] *See e.g.*, Swineford v. Snyder County, 15 F.3d 1258, 1266 (3rd Cir. 1994) (holding that collateral estoppel bars relitigation of issues); Mitchell v. Humana Hosp., 942 F.2d 1581, 1583 (11th Cir. 1991) (stating "collateral estoppel operates to prevent the relitigation of issues"); Virginia Hosp. Ass'n v. Bables, 830 F.2d 1308, 1311 (4th Cir. 1987) (stating that doctrine of collateral estoppel precludes relitigation of issues of law or fact).

[50] *See supra* note 48.

collateral estoppel's practical effect on parties in actual cases. Although collateral estoppel indeed prevents relitigation of the estopped issue, that truism is not particularly important.[51] Far more important is the manner in which collateral estoppel actually affects parties to lawsuits.[52]

Collateral estoppel's actual effect on litigants in specific cases depends on how and why the estopping party seeks to use the doctrine.[53] Since lawsuits are won and lost based entirely upon the propositions that parties are or are not able to establish as true, the estopping party ultimately would assert collateral estoppel for only one of two reasons: (a) to prevent the estopped party from establishing a proposition; or (b) to establish a proposition itself. Suppose the estopping party asserts collateral estoppel to prevent the estopped party from establishing a proposition. If the estopping party is successful, collateral estoppel's preclusive effect is to prevent the estopped party from establishing or even asserting that proposition—even if the estopped party otherwise could successfully assert that proposition. Alternatively, suppose the estopping party asserts collateral estoppel to establish a proposition *itself*. If the estopping party is successful, collateral estoppel has a different preclusive effect: that proposition is treated as conclusively established, even if the estopped party otherwise could successfully refute that proposition.

Collateral estoppel's practical preclusive effect, therefore, is to establish, or to prevent the establishment of, propositions.

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[51] *See* 1B MOORE & LUCAS, *supra* note 1, ¶ 0.443[2] (suggesting that identifying estopped issue itself is unhelpful in understanding operation of collateral estoppel in actual cases).

[52] Courts should analyze and resolve collateral estoppel issues in terms of their effect on the actual litigants involved. *See* 18 WRIGHT ET AL., *supra* note 1, § 4416, at 144 ("[A]nswers that seem satisfying in the abstract must be tested against the real needs of litigants . . . . ").

[53] *See* 1B MOORE & LUCAS, *supra* note 1, ¶ 0.443[2] ("Since collateral estoppel, like res judicata, must be affirmatively pleaded, [collateral estoppel analysis begins when] a party pleads a claim for relief, or asserts a fact, or makes an argument that the opposing party contends was determined against him in a previous litigation. Thus, the dimensions of the [estopped] 'issue' are always determined by the contention in the second case.").

To be sure, whether those propositions are deemed established, or precluded from being established, depends upon their consistency or inconsistency with a prior determination of an issue.[54] Nevertheless, from the parties' perspective, what matters is the proposition at issue in the subsequent case, not the prior issue.

In short, the application of collateral estoppel prevents the estopped party from either: (a) asserting the proposition that the estopping party seeks to preclude (because that proposition is inconsistent with a prior determination); or (b) denying the proposition that the estopping party seeks to establish (because that denial is inconsistent with a prior determination).[55] In other words, what matters is that collateral estoppel precludes the estopped party from making assertions or denials to the extent that they are inconsistent with the prior determination.[56]

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[54] A proposition is treated as established, pursuant to the operation of collateral estoppel, only to the extent that it necessarily follows from the prior determination. Conversely, a proposition is precluded from being established, by virtue of collateral estoppel, only to the extent that it is inconsistent with the prior determination of the issue. *See infra* note 55.

[55] Commentators have noted that, above and beyond precluding relitigation of an issue, collateral estoppel precludes contentions inconsistent with the prior determination of the issue. *See* 1B MOORE & LUCAS, supra note 1, ¶ 0.443[2] ("Any contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue, then, is subsumed in that issue and precluded by the effect of the prior judgment as collateral estoppel.").

The distinction here made between an assertion and a denial reflects the distinction between issues as to which the estopping party bears the burden of proof and issues as to which the estopped party bears the burden of proof. When the party to be estopped does not bear the burden of proof on an issue, it does not have to make any positive assertion with respect to that issue; instead, it can merely deny that the estopping party can meet the burden of proof. Thus, it is important to note that the estopped party is precluded not only from making positive assertions concerning that issue, but also from even denying that the estopping party can meet its burden on that issue.

By contrast, if the estopped party bears the burden of proof as to an issue, it must make positive assertions with respect to that issue. The estopped party gains nothing by denying that the estopping party can prove anything with respect to that issue, since the estopping party does not have to prove anything. Thus, any preclusion of the estopped party's denial would be meaningless; all that matters is that the estopped party is precluded from making assertions.

[56] This characterization of collateral estoppel's preclusive effect builds on the

This distinction—between precluding litigation of issues on the one hand and precluding assertions or denials on the other—is not merely academic. Rather, it can make a substantial difference if collateral estoppel is asserted to preclude the estopped party from making a denial.[57] In that case, preclusion of relitigation of the estopped issue does *not* equate to preclusion of the denial.

For example, suppose that a train operated by Dumbco and driven by Driver collides with an automobile containing Paul and Patricia. Paul files a negligence action against Dumbco. Applicable law provides that train travel in excess of lawful limits constitutes negligence per se and establishes prima facie that the defendant breached the applicable standard of care. At trial, it is determined that Dumbco's train exceeded the speed limit. Suppose further that Patricia subsequently sues Dumbco but, for whatever reason, would be unable to make her own independent showing that the train exceeded the speed limit.

In this hypothetical, collateral estoppel would not harm Dumbco if it merely prohibited Dumbco from *relitigating* the issue of whether the train exceeded the speed limit. Were that the case, Dumbco could simply do nothing, not relitigate the issue of whether the train exceeded the speed limit, and wait for Patricia to fail to meet her burden of showing that Dumbco

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second Restatement's characterization. The Restatement characterizes collateral estoppel's preclusive effect as follows: collateral estoppel makes the determination of the estopped issue in the prior litigation conclusive in the subsequent litigation. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980). This articulation of collateral estoppel's practical effect is far more pertinent than courts' usual statement that collateral estoppel precludes relitigation of the estopped issue. Although parties do not care about relitigating issues as such, they do care what determinations are conclusive, because the parties might wish to take positions inconsistent with that determination.

The proposed characterization does no more than take the second Restatement's view of the preclusive effect to its logical conclusion: because the prior determination is conclusive, assertions or denials are impermissible to the extent that they are inconsistent with that prior determination.

[57] By contrast, if the estopping party seeks to preclude the estopped party from making an assertion, the distinction is unimportant. If the estopped party cannot litigate the issue by which he would prove his assertion, then he is effectively precluded from making that assertion.

breached the standard of care. Thus, Dumbco would prevail despite the application of collateral estoppel.

In reality, however, collateral estoppel would harm Dumbco. Its actual effect is that the prior determination that the train speeded is conclusive in Patricia's case.[58] In other words, Dumbco effectively cannot deny the speeding in Patricia's case, because the speeding is treated as conclusively established. Thus, by itself collateral estoppel enables Patricia to establish speeding—*i.e.*, breach of the standard of care—thereby saving her claim.

Suppose instead that in Paul's suit against Dumbco, applicable law recognizes contributory negligence. Suppose further that the jury returns a verdict for Dumbco based on its express finding that Paul was contributorily negligent. Paul thereafter sues Driver. Suppose that Driver wishes to assert that Paul was contributorily negligent, but for some reason she cannot marshall any evidence of contributory negligence. In that case, collateral estoppel would not harm Paul if it merely barred him from relitigating the issue of his contributory negligence. Indeed, Paul would prefer not to litigate that issue, let Driver waste her time litigating the issue unsuccessfully, and prevail once Driver fails to meet her burden of showing contributory negligence.

In reality, however, collateral estoppel does more than prevent Paul's relitigation of the contributory negligence issue. It effectively prevents him from denying that he was contributorily negligent. In other words, collateral estoppel alone turns Paul's victory into a defeat.

In these examples, when the estopping party asserts collateral estoppel to preclude a denial, collateral estoppel's practical preclusive effect is detrimental to the estopped party. By contrast, the estopped party suffers no detriment from being barred from the actual act of relitigating the estopped issue. That effect, by itself, is incidental and insignificant. Therefore, courts should not frame collateral estoppel issues in terms of

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[58] *See supra* note 56 (citing the second Restatement's articulation of the preclusive effect of collateral estoppel).

that effect.

To summarize, what is actually precluded by the application of collateral estoppel? Not relitigation of issues previously determined, but rather assertions or denials inconsistent with prior determinations of issues.[59] For this reason, this Article proposes that courts frame collateral estoppel issues in terms of the assertions or denials that the estopping party seeks to preclude.

B. Confusing Interplay Between Existing Black-letter Rules

Collateral estoppel is generally considered a simple and monolithic concept. Federal courts often presume that the doctrine can be explained adequately by reference to the collateral estoppel test and that there exists only a single version of the test.[60] Lawyers tend to regard collateral estoppel law as con-

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[59] One commentator discusses the unimportance of the issue to be precluded, and the importance of the assertion or denial to be precluded. In explaining how to identify the issue to be precluded, Moore notes:

> Since collateral estoppel, like res judicata, must be affirmatively pleaded, the identification of issues begins in the case in which a party pleads a claim for relief, or asserts a fact, or makes an argument that the opposing party contends was determined against him in a previous litigation. Thus the dimensions of the "issue" are always determined by the contention in the second case. This may be the assertion of a claim inconsistent with the judgment on the ultimate issue in the first case.

1B MOORE & LUCAS, *supra* note 1, ¶ 0.443[2].

Some courts have recognized that collateral estoppel's actual significance is that it makes the determination of issues in prior proceedings conclusive in subsequent actions. *See, e.g.*, United States v. Meza-Soria, 935 F.2d 166, 169 (9th Cir. 1991) ("[u]nder the collateral estoppel doctrine, where a question of fact essential to the judgment is actually litigated and determined by a valid judgment, the determination is conclusive between the same parties in a subsequent action.") (alteration in original); *In re* Cooper, 70 B.R. 554, 558 (Bankr. S.D. Fla. 1987) (stating estopped party is bound by findings of fact and law made in prior proceedings). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980) ("When an issue of fact or law is actually litigated and determined . . . [it] is conclusive in a subsequent action . . . ."). Unfortunately, even these courts frame the collateral estoppel issue in terms of the prior issue, rather than the proposition at stake in the second case.

[60] *See* Ashe v. Swenson, 397 U.S. 436, 443 (1970) ("'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has

sisting simply of a uniform, invariable, known set of elements.[61]

Unfortunately, collateral estoppel is not that simple. In reality, courts—even within the same jurisdiction—set forth differing versions of the collateral estoppel test. Courts then compound the permutations of the collateral estoppel inquiry by creating tests and qualifications for the elements set forth in the collateral estoppel tests. As a result, contrary to common perceptions, collateral estoppel analysis involves a complex, multi-tiered analysis rather than a straightforward application of one readily-identifiable test.

1. Competing Versions of the Collateral Estoppel Test

Like other legal doctrines, collateral estoppel may be described in alternative ways which differ somewhat from one another. Courts in different jurisdictions describe collateral estoppel in different terms, articulating different versions of

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once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in any future lawsuit."); *In re* Standard, 123 B.R. 444, 449 (Bankr. N.D. Ga. 1991) (presuming that under federal law, there exists single, uniform version of collateral estoppel test).

[61] Indeed, law students learn from their textbooks that collateral estoppel is definable by one clear-cut set of elements:

> The black letter of issue preclusion is simple:
> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

LANDERS ET AL., *supra* note 41, at 948 (quoting RESTATEMENT (SECOND) OF JUDGMENT'S § 27 (1982)). The authors describe their entire treatment of collateral estoppel as follows: "[W]e approach issue preclusion by exploring [the collateral estoppel elements] in turn." *Id.*

Noticeably absent at this point is any reference to considerations other than the existence or non-existence of the elements. Indeed, the authors thereafter indicate that issue preclusion turns solely on the existence or non-existence of the collateral estoppel elements. *Id.* at 999 ("If the issue is identical and if the other conditions for preclusion are met, preclusion applies.")

To be sure, the authors subsequently address judicial discretion and exceptions to the applicability of collateral estoppel, but not before leading the student to regard collateral estoppel's applicability as depending solely on the existence or non-existence of its elements.

the collateral estoppel test.[62] Although inconsistent with the common perception of collateral estoppel as a generally uniform doctrine,[63] this phenomenon is not surprising or problematic in and of itself.

What is discomfiting is the fact that courts within the same jurisdiction articulate different versions of the collateral estoppel test.[64] Intracourt pronouncements of the collateral estoppel test sometimes vary with respect to the number of elements.[65] For example, one opinion might set forth a four-element test of collateral estoppel, while a contemporaneous opinion from the same court recites a three-element test.[66] In addition, even if two opinions from the same court recite the same number of elements, the opinions might differ significantly with respect to the precise verbal formulation of a given element. For instance, intracircuit descriptions often differ with respect to the element prescribing the parties that can be collateral estopped. In the Fourth Circuit, for example, opinions differ regarding whether the party to be estopped must: (a) have been a party, or in privity with a party, to the prior ac-

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[62] *See supra* notes 38-39 and accompanying text (noting difference between three-element and four-element articulations of the collateral estoppel elements); *infra* note 123 (noting that one court recognizes a requirement as part of a fourth collateral estoppel element, while another court, using three elements, recognizes the same requirement). *Compare, e.g.*, United States v. $80,080 in United States Currency, 779 F. Supp. 169, 172-73 (N.D. Ga. 1991) (holding that estopped issue must have been actually litigated) *with* Fund for Animals, Inc. v. Lujan, 794 F. Supp. 1015, 1024, (D. Mont. 1991) (declaring estopped issue must have been actually litigated and decided after full and fair opportunity to be heard), *aff'd*, 962 F.2d 1391, 1402 (9th Cir. 1992).

[63] *See supra* notes 60-61 and accompanying text.

[64] *Compare, e.g.*, Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985) (stating that determination of issue in prior litigation must have been critical and necessary part of prior litigation) *with* Cotton States Mut. Ins. Co. v. Anderson, 749 F.2d 663, 666 (11th Cir. 1984) (stating that determination of issue was necessary in prior action) *and with In re* Raiford, 695 F.2d 521, 523 (11th Cir. 1983) (stating necessity that prior litigation could not have been decided without resolving issue).

[65] *See infra* note 66.

[66] *Compare, e.g.*, Lubrizol Corp. v. Exxon Corp., 632 F. Supp. 326, 331 (S.D. Tex. 1986) (stating that "[t]hree criteria must be established before the doctrine of collateral estoppel is invoked") *with* Amicus, Inc. v. Post-Tension of Tex., Inc., 686 F. Supp. 583, 589 (S.D. Tex. 1987) (citing four-element collateral estoppel test).

tion; or (b) have had a full and fair opportunity to litigate the issue.[67] The result of the myriad versions of the collateral estoppel test is that even sophisticated litigants and lawyers risk reciting and arguing in terms of elements that the court refuses to recognize.[68]

2. *Element Tests*

Perceiving the ambiguity of the terms of the collateral estoppel elements,[69] and seeking guidance in interpreting those terms, courts have adopted tests ("element tests") for determining the existence *vel non* of various collateral estoppel elements. Unfortunately, the element tests perversely render the interpretation and application of the collateral estoppel elements even more tricky. Element tests render the elements moot, necessitate an extra layer of analysis, and multiply the number of tests required to address a collateral estoppel issue.

For example, some courts recognize an element test for the requirement that the judgment in the prior litigation is "final." These courts decide whether the prior judgment is final by employing a flexible test in which multiple factors are considered.[70] Other courts start with the issue of whether the prior judgment is final, then rephrase it in terms of whether the prior judgment is "sufficiently firm" to be accorded preclusive effect. Of these courts, some decide whether the prior judgment was "sufficiently firm" by using a multi-factor test, while others decide by using a three-requirement test.[71]

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[67] *Compare* Riley v. Murdock, 828 F. Supp. 1215, 1223 (E.D.N.C. 1993) ("[P]arty must have been a party to the earlier action, or be in privity with that party to the earlier action . . . .") *with* Virginia Hosp. Ass'n v. Baliles, 830 F.2d 1308, 1311 (4th Cir. 1987) (holding that party to be estopped must have full and fair opportunity to litigate).

[68] *Cf. In re* Bendectin Products Liability Litig., 732 F. Supp. 744, 747 (E.D. Mich. 1990) (illustrating litigant's citing of element test not recognized by court).

[69] See *infra* notes 102-23 and accompanying text.

[70] *See* Gresham Park Community Org. v. Howell, 652 F.2d 1227, 1243 (5th Cir. Unit B 1981) (quoting Miller Brewing Co. v. Jos. Schlitz Brewing Co., 605 F.2d 990, 996 (7th Cir. 1979)).

[71] *See* Still v. Michaels, 791 F. Supp. 248, 251 (D. Ariz. 1992) ("A judgment is 'sufficiently firm' where the parties were fully heard, the court supported its deci-

Similarly, some courts use a multi-factor test in assessing the requirement that the party to be estopped had a full and fair opportunity to litigate the issue in a prior proceeding.[72] Other courts recognize a different, two-prong element test for the "full and fair opportunity" element. According to these courts, this element is satisfied if the party to be estopped (1) was a party to the prior litigation; or (2) had a direct financial or proprietary interest in the prior litigation and assumed control over the prior litigation.[73] Prong two, in turn, requires yet another layer of analysis: the party "assumed control" over the prior litigation only if it had a choice as to the legal theories and proofs to be asserted on behalf of the party to the action, and had "control" over the opportunity to seek appellate review.[74]

The end result is that the actual requirements of the "full and fair opportunity" element are more specific and narrower than the hazy language of that element would indicate. In this manner, the element test supersedes the element itself. Therefore, litigants should forego arguing about whether the party to be estopped had a full and fair opportunity to litigate the issue to be precluded, and instead argue directly about whether the two prongs of the element test are satisfied. To argue in terms of the broader concept of "full and fair opportunity to litigate" is to miss the point, and a litigant making such an argument

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sion with a reasoned opinion, and the decision was subject to appeal or was in fact reviewed on appeal."); General Dynamics Corp. v. Amer. Tel. & Tel. Co., 650 F. Supp. 1274, 1287 (N.D. Ill. 1986) (using a multi-factor test for "sufficiently firm"), *certification granted*, 658 F. Supp. 417 (N.D. Ill. 1987). Both *General Dynamics Corp.* and *Gresham Park Community Org.*, *supra* note 70, cited *Miller Brewing Co.* as authority for the use of a multi-factor test for finality. *General Dynamics Corp.*, 650 F. Supp. at 1287; *Gresham Park*, 652 F.2d at 1243. *General Dynamics Corp.* also followed *Miller Brewing Co.* by rephrasing the issue before using the multi-factor test. *General Dynamics Corp.*, 650 F. Supp. at 1287. By contrast, *Gresham Community Park Org.* departed from *Miller Brewing Co.* insofar as it ignored the intermediate step of rephrasing the issue. *Gresham Park*, 652 F.2d at 1243.

[72] *See* Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1521 (10th Cir. 1990).

[73] Virginia Hosp. Ass'n v. Baliles, 830 F.2d 1308, 1312 (4th Cir. 1987) (citing Montana v. United States, 440 U.S. 147, 154 (1979)).

[74] *Virginia Hosp. Ass'n*, 830 F.2d at 1313.

effectively is ambushed by its reliance on the actual language of the element.[75] In this manner, these (and other) element tests[76] undermine the reliability of the supposed anchor of collateral estoppel analysis, the collateral estoppel test.

3. Qualification of the Elements

The interpretation and application of the collateral estoppel elements is rendered even more unpredictable by courts' qualification of those elements. By prescribing various modifications and qualifications of the elements, courts effectively redefine the elements in a manner incompatible with their express terms.

For instance, courts have stated that when a plaintiff asserts collateral estoppel offensively, *i.e.*, to preclude a defendant from raising matters that the defendant previously litigated and lost,[77] the court must take special care to ensure that the defendant had a full and fair opportunity to litigate the issue in the prior proceeding.[78] In other words, in offensive collateral estoppel cases, the requirement is not "full and fair," but rather "especially full and fair," or perhaps "more obviously full and fair." Thus, although courts' articulation of the collateral estoppel test contemplates a single version of the "full and fair opportunity" element, courts effectively recognize two different versions.

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[75] Similarly, a litigant easily can be undone by relying on an element test for the "full and fair opportunity" requirement that the court refuses to recognize. *See In re* Bendectin, 732 F. Supp. at 747.

[76] As an example of another element test, when a determination is an independent but alternative grounds for deciding the prior litigation, a sub rule governs whether that determination is "necessary" to the decision in the prior litigation. *See* General Dynamics Corp. v. American Tel. & Tel. Co., 650 F. Supp. 1274, 1285 (N.D. Ill. 1986) (stating the majority rule that such decision was "necessary" to the prior decision), *certification granted*, 658 F. Supp. 417 (N.D. Ill. 1987). In addition, the second Restatement claims that "there are several factors that should be considered in deciding whether for purposes of the rule [the collateral estoppel test] of this Section the 'issue' in the two proceedings is the same. . . ." RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1980).

[77] *See, e.g.*, *In re* Ivan F. Boesky Sec. Litig., 848 F. Supp. 1119, 1123 (S.D.N.Y. 1994) (defining "offensive use of collateral estoppel").

[78] *In re* McWhorter, 887 F.2d 1564, 1567 (11th Cir. 1989).

In addition, if the prior litigation was settled by a consent decree, the requirement that the issue was actually litigated in the prior litigation is changed to a requirement that the parties agreed in the consent decree to preclude the issue in future litigation.[79] Thus, for purposes of this requirement, an issue can be "actually litigated" even if it was *not* litigated. Moreover, "prior litigation," for purposes of this requirement, includes previous stages of the same litigation.[80] In other words, "prior" litigation does not always mean prior litigation; sometimes it means the current litigation, albeit in earlier stages.

4. Exceptions to the Collateral Estoppel Test

Even if all elements are present in a given case, such that the collateral estoppel test is satisfied, a litigant still cannot reliably predict whether the court will apply collateral estoppel. To be sure, if the collateral estoppel test is satisfied, collateral estoppel generally applies.[81] Nevertheless, the application of collateral estoppel is subject to so many legal exceptions that even the satisfaction of the collateral estoppel test often is not a reliable indicator that the court will apply collateral estoppel in a given case.

Courts recognize numerous legal exceptions to the rule that collateral estoppel is applicable when all elements are present.[82] For instance, there is an exception to collateral es-

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[79] Richardson v. Alabama State Bd. of Educ., 935 F.2d 1240, 1245 (11th Cir. 1991).

Some courts recognize another, similar modification of the requirement that the precluded issue previously was "actually litigated." Specifically, when the issue in the prior litigation was resolved not adversarially, but by stipulation, the issue is subject to preclusion if the stipulating parties manifest an intention to be bound by the stipulation in future cases or when the stipulation merely helps to shape the record. *See* General Dynamics Corp. v. American Tel. & Tel. Co., 650 F. Supp. 1274, 1283 (N.D. Ill. 1986), *certification granted*, 658 F. Supp. 417 (N.D. Ill. 1987).

[80] *See* 18 WRIGHT ET AL., *supra* note 1, § 4418 (noting application of direct estoppel within single suit).

[81] *In re* Evans, 161 B.R. 474, 477 (Bankr. 9th Cir. 1993) ("If the elements of collateral estoppel are established, collateral estoppel will be applied to give preclusive effect to the decision in the prior proceeding.").

[82] *See supra* notes 41-48 and accompanying text.

toppel when the standard of proof with respect to the estopped issue was not the same in the prior litigation and the current litigation.[83] Some courts recognize an exception when the possibility exists that new facts, relevant under controlling legal principles, surround the continuation of the conduct at issue.[84] Courts also recognize an exception for material factual differences between the prior and current litigation.[85] Exceptions to collateral estoppel also exist in the following situations: when there has been a change in controlling legal principles between the prior proceeding and the present proceeding; when the issue is purely legal and where the prior and present proceedings are substantially unrelated; or when a new determination is warranted to avoid inequitable administration of the laws.[86]

These exceptions are problematic because they undermine the conclusiveness—and thus the reliability—of the collateral estoppel tests.[87] Furthermore, they necessitate an extra layer of analysis for the resolution of collateral estoppel issues.[88]

Proper analysis is further impeded by confusion between (a) the existence of an exception and (b) the nonexistence of an element. One opinion states that "[t]o the extent that differences in parties reflects differences in the issues actually decided, it would be unjust" to apply collateral estoppel to effectively bar a new lawsuit.[89] The court's apparent implication was that circumstances warranted an exception to collateral estoppel to

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[83] *E.g.*, United States v. Davis, 116 B.R. 306, 307 (Bankr. M.D. Ga. 1990) (citing *In re* Lichter, 104 B.R. 521, 521 (Bankr. M.D. Ga. 1989)).

[84] *E.g.*, Fund for Animals, Inc. v. Lujan, 794 F. Supp. 1015, 1024 (D. Mont. 1991), *aff'd*, 962 F.2d 1391, 1402 (9th Cir. 1992).

[85] Arkla, Inc. v. United States, 27 Fed. Cl. 226, 232 (1992), *aff'd*, 37 F.3d 621 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 1399 (1995).

[86] North Ga. Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429, 434-35, 435 (11th Cir. 1993) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28(2) (1982)).

[87] *See* 18 WRIGHT ET AL., *supra* note 1, § 4416, at 265 (noting that variations from general rules potentially undermine those rules).

[88] *See* United States v. Stauffer Chem. Co., 464 U.S. 165, 169 (1984) (noting that in Montana v. United States, 440 U.S. 147 (1979), court first found collateral estoppel elements, then looked to see if circumstances warranted exception to preclusion).

[89] Tetenes v. County of Rockland, 146 F.R.D. 82, 84 (S.D.N.Y. 1993).

avoid injustice. However, collateral estoppel's inapplicability under those circumstances is more sensibly explained by the absence of the "same issues" element.[90]

For another example, the Fourth Circuit has stated that collateral estoppel should be applied only when no unfairness would result, but has been unclear as to whether this condition is one of the elements of collateral estoppel, or whether it signals an exception to collateral estoppel.[91] Other courts, in discussing the role of fairness in collateral estoppel issues, frequently fail to clarify whether they are addressing the "full and fair opportunity" element or whether they are prescribing an overriding "unfairness" exception to collateral estoppel.[92] As a

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[90] *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. j (1980) (noting that some courts' refusal to give preclusive effect to determinations of "evidentiary fact" "could more appropriately be based on the lack of similarity between the issues in the two proceedings").

[91] *See* Swentek v. USAIR, Inc., 830 F.2d 552, 561 (4th Cir. 1987). In *Swentek*, the court stated that in order to satisfy the elements of collateral estoppel, the party to be estopped must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Swentek*, 830 F.2d at 561. The court also stated that collateral estoppel is appropriate when "preclusion does not work an unfairness in the second trial." *Id.*

[92] *E.g.*, General Dynamics Corp. v. American Tel. & Tel. Co., 650 F. Supp. 1274, 1281-82 (N.D. Ill. 1986) ("In addition [to four elements previously discussed by the court], the court should consider whether application of collateral estoppel would be substantially unfair to the party to be estopped."), *certification granted*, 658 F. Supp. 417 (N.D. Ill. 1987).

This confusion is vividly illustrated by *In re* Southold Development Corp., 136 B.R. 40, 42 (E.D.N.Y. 1992). There the court stated:

> RIPF correctly notes that collateral estoppel will not be applied when there is an "overriding issue of fairness to a litigant." However, when the Supreme Court examined the issue of fairness in the application of collateral estoppel in *Parklane Hosiery Co. Inc. v. Shore*, the examples it gave of circumstances in which a court should use its discretion to bar the use of collateral estoppel all pertained to the parties' ability to fully and fairly litigate the issue in the first action. RIPF does not, and cannot contend that it lacked a full and fair opportunity to litigate the issue . . . in the prior adjudication.

Id. at 42 (citations omitted).

This discussion seemed to indicate that fairness only bore on the "full and fair opportunity" element. However, the court did not expressly rule out the possibility of an overriding fairness exception. Moreover, the court's implication that fairness plays into the court's exercise of its discretion arguably is inconsistent with the

final example, the rule that collateral estoppel is inapplicable when the estopped issue was decided under a lower standard of proof in the prior litigation, although generally described as an exception, is arguably a mere application of the "same issues" element.[93]

5. *Excessive Layers of Analysis*

As a result of the structure of the existing body of black-letter rules, and the function of many individual rules vis-a-vis other rules, collateral estoppel analysis is unnecessarily long and complicated. In every case, black-letter collateral estoppel analysis involves one or two steps: (1) determining whether the collateral estoppel test has been satisfied; and, if so, (2) determining whether there exists a legal exception to the general rule that collateral estoppel applies when the collateral estoppel test has been satisfied.[94]

Unfortunately, the analysis is more complicated than this two-step articulation would suggest. The first step alone could involve up to five substeps: (1) identifying the jurisdiction's collateral estoppel test or tests;[95] (2) deciding which collateral estoppel test to use if the jurisdiction has recognized more than one version;[96] (3) identifying all element tests;[97] (4)

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notion that fairness only bears on whether an element is present, inasmuch as the presence of the element is *not* a finding committed to the sound discretion of the district court. *See supra* note 44.

[93] If one describes the issues in terms of the standard of proof by which the issues were decided, different standards of proof necessarily entail different issues. For example, consider consecutive civil and criminal battery cases in which the defendant claims he was not the perpetrator. If that the defendant is held liable for damages in the civil action, one might describe the issue there decided as, "By a preponderance of the evidence, was the defendant the perpetrator?" Similarly, one could describe the corresponding issue in the criminal case as, "Beyond a reasonable doubt, was the defendant the perpetrator?" Thus framed, the issues are not the same, and the collateral estoppel claim fails even before the exceptions are invoked.

[94] *See supra* note 88 (noting court inquires into existence of possible exceptions after determining that collateral estoppel test has been satisfied).

[95] *See supra* note 88 (noting that collateral estoppel test is the first stage of black-letter analysis); *supra* note 61 (examining elements of collateral estoppel before examining possible exceptions).

[96] *See supra* notes 64-67 and accompanying text (noting intrajurisdictional

identifying all qualifications to the collateral estoppel elements;[98] and (5) applying the proper collateral estoppel test, in light of all element tests and qualifications, to the facts of the case at bar.[99]

Although steps one and two above comprise the entire black-letter analysis, in many cases they do not end the inquiry. If the collateral estoppel test has been satisfied and if no exception is applicable, a third step is required: determining whether the court will exercise its discretion not to apply collateral estoppel.[100]

It is therefore painfully obvious that under current black-letter law, a disciplined and thorough resolution of a collateral estoppel issue is a tortuous and laborious process. If it is not ipso facto obvious that the process is unnecessarily tortuous and laborious, that unfortunate truth is revealed by the fact that a much simpler process would result in superior collateral estoppel decisionmaking. Such a process is proposed in Section V.[101]

C. Ambiguous Black-letter Rules

As set forth above, it can be extremely difficult to identify the black-letter rules that are dispositive of a collateral estoppel issue. Even if they could be identified, those rules often are so subjective that they simply are not susceptible to consistent, predictable interpretations. This latter problem results from the following three features of existing rules.

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inconsistency in articulating collateral estoppel test).

[97] *See supra* notes 70-76 and accompanying text (discussing element tests).

[98] *See supra* notes 77-80 and accompanying text (discussing qualification of elements).

[99] Obviously, this step is required to finish the analysis in the context of a specific case.

[100] *See supra* notes 45-47 and accompanying text (describing judicial discretion in this regard).

[101] *Infra* text accompanying notes 151-204.

1. Ambiguous Collateral Estoppel Elements

An examination of various collateral estoppel elements reveals that their terms are so subjective that the elements' presence in many cases cannot be predicted with any certainty whatsoever.

This unfortunate truth is especially apparent from an examination of collateral estoppel's first element. Invariably, collateral estoppel's first requirement is that the issue to be precluded bears a close relationship to an issue involved in a prior proceeding. Courts use various phrases to express the requisite relationship: the issues must be (take your pick) "identical,"[102] "the same,"[103] "precisely the same,"[104] or "in substance the same."[105] Put differently, collateral estoppel requires "identity of issues."[106] Conversely, the first element of collateral estoppel is not satisfied if the issues are (take your pick): "not common,"[107] "distinctly different,"[108] "not identical,"[109] "not the same,"[110] "different,"[111] or "not the equivalent."[112]

The extreme elusiveness of the concept underlying this element—which will be referred to hereinafter in derivations of the word "same"—is evident from the sheer number of ways in which courts have attempted to describe the concept. Sameness has been described and defined in so many different ways precisely because it defies description and definition. Courts' frus-

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[102] Atiya v. Salt Lake County, 988 F.2d 1013, 1019 (10th Cir. 1993).

[103] American Train Dispatchers Ass'n v. Burlington N. R.R., 784 F. Supp. 899, 903 (D. D.C. 1992).

[104] Weir v. United States, 716 F. Supp. 574, 579 (N.D. Ala. 1989).

[105] Hughes v. Heyl & Patterson, Inc., 647 F.2d 452, 455 (4th Cir. 1981).

[106] *In re* McWhorter, 887 F.2d 1564, 1568 (11th Cir. 1989); *In re* Hamilton, 147 B.R. 779, 782 (Bankr. D. Colo. 1992).

[107] Blendingwell Music, Inc. v. Moor-Law, Inc., 612 F. Supp. 474, 484 (D. Del. 1985).

[108] Engineers Club v. United States, 791 F.2d 686, 688 (9th Cir. 1986).

[109] Held v. Mitsubishi Aircraft Int'l, Inc., 672 F. Supp. 369, 387 (D. Minn. 1987).

[110] Fullerton Aircraft Sales & Rentals, Inc. v. Beach Aircraft Corp., 842 F.2d 717, 720 (4th Cir. 1988).

[111] Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1399 (9th Cir. 1992).

[112] Jeppesen Sanderson, Inc. v. United States, 19 Cl. Ct. 233, 237 (1990).

trating attempts to apply these definitions, in turn, further reveal courts' understandable inability to master and explain sameness.[113]

The difficulty here is that asking whether two things are "the same" is never a factual inquiry, capable of scientific, conclusive resolution. It cannot be determined, as a matter of concrete fact, that two items are or are not the same. Rather, a subtle, inscrutable continuum runs from "different," through "similar," to "same."[114] Thus, resolving this inquiry involves a subjective judgment call as to whether two items are sufficiently close to the "same" end of that continuum that they should be labeled "the same".[115] In short, sameness is in the eye of the beholder; what one person considers "the same" might not be "the same" to someone else.[116]

The subjectivity of the concept of sameness is further demonstrated by courts' frequent pronouncement that an issue is precluded because it is "substantially" or "substantively" the same as the issue in the prior proceeding.[117] When reciting

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[113] *See* Riley v. Murdock, 828 F. Supp. 1215, 1222-23 (E.D.N.C. 1993).

[114] *See* N.D. Ga. Internal Operating Procedures Rule 905-2(a) (dictating that, for purposes of court's definition of "related" cases involving "same issue of fact," case is not "related" if it involves facts that are only "similar rather than identical"). *Cf.* United States v. Stauffer Chem. Co., 464 U.S. 165, 171 n.4 (1984) (noting that rigid determination as to whether issue is one of "fact," "law" or "mixed fact and law" would often be impossible because "the journey from a pure question of fact to a pure question of law is one of subtle graduations rather than one marked by a rigid divide") (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. b (1980)).

[115] *See* 18 WRIGHT ET AL., *supra* note 1, § 4417, at 162 (1981) (noting ad hoc nature of this determination).

[116] "If an ordinary person would expostulate 'But that's a different issue,' probably it is." *Id.* Wright and Miller are correct to emphasize the personal origin and subjective nature of any conclusion as to whether issues are "different." Unfortunately, their hypothetical presumes that ordinary people could reach only one conclusion, based on common sense and experience, as to whether or not issues are "different." Their hypothetical thus fails to acknowledge or account for troublesome cases in the gray area, i.e., cases in which ordinary persons could and would disagree as to whether the issues involved are different.

[117] *See* Richey v. IRS, 9 F.3d 1407, 1410 (9th Cir. 1993) (collateral estoppel was applicable where issues were "substantially identical"); Hughes v. Heyl & Patterson, Inc., 647 F.2d 452, 455 (4th Cir. 1981) (collateral estoppel requires that the issues be "in substance the same"); *In re* Hamilton, 147 B.R. 779, 782 (Bankr.

the collateral estoppel elements, courts almost always purport to require that issues be the same, rather than merely "substantially the same."[118] In close cases, then, why do they switch the basis of their decisions from sameness to "substantial" sameness? The reason seems clear. "Substantial" sameness is a broader concept than sameness, and it is therefore easier to justify using the former rather than the latter label. In other words, a proclamation of "substantial" sameness is less debatable and less controvertible than a proclamation of unqualified sameness. Thus, when a court is uncertain whether to pronounce two issues the same, it hedges its bet and makes the less ambitious pronouncement that the issues are *substantially* the same.

In this manner, courts manifest their instinctive understanding that labeling two issues the "same" is a dicey business. In many cases, whether two issues should be so labeled is a close call, one that is necessarily subjective in nature. Due to this extreme subjectivity, the existence or non-existence of the first collateral estoppel element tends to be uncertain.

Another element of collateral estoppel, the commonly recognized requirement that the party to be estopped had a full and fair opportunity to litigate the issue in the prior proceeding, is equally subjective. Ultimately, this requirement necessarily turns on the trial judge's own subjective sense of justice and equity.[119] Given that few concepts in the law are as vague and subjective as the notion of "fairness,"[120] how can one pre-

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D. Col. 1992) (collateral estoppel requires "substantive" identity of issues), *aff'd*, 46 F.3d 1151 (10th Cir. 1994).

[118] Even when a court finds the requirement of sameness satisfied because there is "substantive" sameness or identity, the court's statement of collateral estoppel elements earlier in the opinion typically recites an unqualified requirement of "same" or "identical" issues. *See, e.g.*, Hughes v. Heyl & Patterson, Inc., 647 F.2d 452, 453 (5th Cir. 1981) (stating that critical question in determining applicability of collateral estoppel is whether issue is substantively same); *In re* Hamilton, 147 B.R. at 782, 783 (stating that collateral estoppel requires "same" issues, then finding that requirement satisfied because there existed "substantive" identity of issues).

[119] *See* Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1521 (10th Cir. 1992) (quoting Blonder-Tongue Labs, Inc. v. University of Ill. Found., 402 U.S. 313, 334 (1971)).

[120] *See, e.g.*, Lundy v. Campbell, 888 F.2d 467, 470 (6th Cir. 1989) (noting that

dict when a judge will find an opportunity to be fair? When is an opportunity "full"?

As yet another example, some courts recognize the requirement that the prior proceeding was decided by a final judgment.[121] This element also is subjective, due the ambiguous nature of the term "final."[122] Indeed, the concept embodied by that term is so variable and elusive that it does not even have a uniform meaning within the law of preclusion; its meaning for collateral estoppel purposes is different from its meaning for res judicata purposes.[123]

2. Ambiguous Element Tests

As noted above, courts rely on element tests in place of collateral estoppel elements that are phrased in less specific terms. Presumably, courts use element tests in order to foster more certainty and analytical structure than is possible by using the elements themselves.

Due to their ambiguity, however, element tests fail to justify the very rationale for their existence. Examination of many element tests reveals that they offer no more certainty than the elements they replace. For example, although the term "full and fair opportunity" undeniably is vague, the terms of the

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fundamental fairness is nothing more than what court thinks fundamental fairness is), *cert. denied*, 495 U.S. 950 (1990).

[121] *E.g.*, Beck v. Levering, 947 F.2d 639, 642 (2nd Cir. 1991) (stating that fourth and final requirement of collateral estoppel is that "the issue previously litigated must have been necessary to support a valid and final judgment on the merits"), *cert. denied sub nom.* Levy v. Martin, 504 U.S. 909 (1992); Gresham Park Community Org. v. Howell, 652 F.2d 1227, 1242 (5th Cir. Unit B. 1981) (stating "the finality requirement is [not] relaxed for purposes of collateral estoppel"); Fund for Animals, Inc. v. Lujan, 794 F. Supp. 1015, 1024 (D. Mont. 1991) (stating that third and final requirement of collateral estoppel is that decision on issue must have been necessary to support valid and final judgment on merits), *aff'd*, 962 F.2d 1391 (9th Cir. 1992).

[122] *See Gresham Park Community Org.*, 652 F.2d at 1243 ("The most liberal federal test for determining finality for preclusion purposes is: '[w]hether a judgment, not final' in the sense of 28 U.S.C. § 1291 [might be final for purposes of collateral estoppel.]'" (quoting Miller Brewing Co. v. Jos. Schlitz Brewing Co., 605 F.2d 990, 996 (7th Cir. 1979))).

[123] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13, 27 cmt. k (1982).

corresponding element test are equally vague.[124] When is a financial interest "direct" as opposed to "indirect?" When was a person's involvement in litigation sufficiently extensive that she "assumed control over" the prior litigation?[125] Similarly, multi-factor element tests inherently are insusceptible to predictable results.[126]

Element tests are intended to promote clarity and certainty in collateral estoppel analysis.[127] Unfortunately, they fail to serve their purpose because they mimic, rather than reduce, the ambiguousness of the collateral estoppel elements.

3. Ambiguous Legal Exceptions

Like its elements,[128] collateral estoppel's exceptions generally are phrased in extremely ambiguous terms. An examination of the aforementioned legal exceptions[129] reveals their subjective nature. For instance, when is a factual difference significant enough to be deemed "material"? When are prior and present legal proceedings "substantially" unrelated, as opposed to, say, only somewhat unrelated? Where is the line between "inequitable" and equitable administration of the laws?

D. Departure from the Black-letter Regime

Although collateral estoppel's body of black-letter rules fosters unpredictable results, a court increases the unpredictability by the frequent practice of eschewing those rules in order to decide collateral estoppel issues on other grounds. Regardless of what the rules dictate, the court may

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[124] *See supra* notes 72-74 and accompanying text (describing two-part element test for "full and fair opportunity" element).

[125] *See Virginia Hosp. Ass'n. v. Baliles*, 830 F.2d 1308, 1313 (4th Cir. 1987) (stating that party had participated in prior litigation, but that this participation did not amount to exercising control over prior litigation).

[126] *See supra* notes 70-72 (citing cases using multi-factor element tests).

[127] *See supra* notes 35-37 and accompanying text.

[128] *See supra* text accompanying notes 102-23 (describing ambiguousness of various collateral estoppel elements).

[129] *See supra* text accompanying notes 82-86.

refuse to apply collateral estoppel based on a discretionary decision or because it disfavors collateral estoppel.[130] In this manner, courts effectively can circumvent the entire body of black-letter law, thus scuttling its reliability.[131]

1. Trial Courts' Discretion Not to Apply Collateral Estoppel

As noted above, trial courts have broad discretion in deciding collateral estoppel issues. At a minimum, this means that they have wide latitude to apply or not to apply collateral estoppel when all elements are present.[132] Such discretion undoubtedly infuses great unpredictability into the determination of collateral estoppel issues, because litigants have no way of knowing whether a court simply will choose not to apply collateral estoppel.

Courts' exercise of their discretion obfuscates and supersedes collateral estoppel rules in another respect. Courts and litigants often blur the distinction between (a) factors indicating that an element is not present; (b) factors indicating that an exception is applicable; and (c) factors indicating that the court should exercise its discretion not to apply collateral estoppel.[133] Courts thus undercut the role of the collateral estoppel tests and create uncertainty as to the proper interpretation of the black-letter rules.

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[130] *See supra* notes 45-47 and accompanying text (describing courts' discretion not to apply collateral estoppel).

[131] *See* 18 WRIGHT ET AL., *supra* note 1, § 4416, at 143 (arguing that discretionary departure from general rules potentially undermines those rules).

[132] *See supra* note 47 and accompanying text.

[133] *See* 18 WRIGHT ET AL., *supra* note 1, § 4426, at 265 (noting that most cases in which courts refuse to apply collateral estoppel due to fairness concerns could be explained in terms of elements and exceptions); *see also supra* note 92 (describing litigant's confusion between non-existence of "full and fair opportunity" requirement and legal exception to avoid injustice).

2. *Courts' Disfavorment of Collateral Estoppel in Certain Contexts*

The unfavorable treatment of collateral estoppel by some courts in some contexts undercuts the reliability of collateral estoppel rules. Some courts hold that although collateral estoppel may apply to pure questions of law, it is less favored in that context with issues of pure fact or mixed fact and law, and is least favored when the issue is one of pure statutory construction.[134] These principles indicate that it may be the degree to which collateral estoppel is disfavored, rather than the application of the rules, that is dispositive of a collateral estoppel claim.

IV. Consequences of Current Problems in Collateral Estoppel Jurisprudence

The aforementioned problems with current collateral estoppel jurisprudence are not merely academic in nature. Rather, they create real, significant adverse consequences for members of the public.

A. Increased Costs for Clients

The confusing nature of current collateral estoppel jurisprudence most directly harms attorneys' clients. Under the present structure of collateral estoppel law, a thorough resolution of a collateral estoppel issue on behalf of a client is so complicated that it can require an astounding amount of time.

To research and analyze a collateral estoppel issue adequately, an attorney must undertake several steps. First, she must identify the applicable collateral estoppel test.[135] In doing so, she must be aware of the possibility that different opin-

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[134] *See* United States *ex rel.* Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Blue Cross Blue Shield, Inc., 755 F. Supp. 1040, 1046 (S.D. Ga. 1990). *Contra* Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1521 (10th Cir. 1990) ("The doctrines of res judicata and collateral estoppel apply equally to issues of fact and rulings of law.").

[135] *See supra* notes 32-33 and accompanying text (describing central role of collateral estoppel tests); *supra* note 61 (describing collateral estoppel analysis).

ions from the jurisdiction embrace different collateral estoppel tests.[136] Then the attorney must find all applicable element tests, being careful to note element tests not recognized by the court involved.[137] Next, she must sift through the jurisdiction's case law to uncover qualifications of the applicable elements and element tests.[138] She then must apply the vague and ambiguous terms of the relevant elements and/or element tests (as qualified). Only then can she form an educated opinion as to whether the court will find the collateral estoppel elements present.

Assuming that she is not reasonably certain that the court will find one or more elements lacking, her analysis is still far from complete. Her next task is to identify the jurisdiction's exceptions to collateral estoppel.[139] She then must apply the vague and ambiguous language of the exceptions to make her best guess as to whether any exception would prevent the application of collateral estoppel.[140] In so doing, she must be careful not to confuse the possible existence of an exception with the possible nonexistence of an element supposedly considered earlier in her analysis.[141]

At this point, the attorney has completed her analysis under collateral estoppel's rules. Given that uncertainty has attended each step of her analysis, the attorney at this stage likely would be unsure whether the rules mandate the applica-

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[136] *See supra* notes 64-67.

[137] *See supra* notes 69-76 and accompanying text (describing various element tests); *In re* Bendectin Prod. Liab. Litig., 732 F. Supp. 744, 747 (E.D. Mich. 1990) (litigant cites element test not recognized by court).

[138] *See supra* notes 77-80 and accompanying text (describing qualifications and modifications of various elements). This part of the collateral estoppel analysis is particularly likely to trip up the analysis because qualifications and modifications to general rules often are undetected. *Cf.* Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief*, LITIG., Winter 1994, at 6, 7 (noting that federal courts of appeals' idiosyncratic supplementation and modification of generally applicable Federal Rules of Appellate Procedure set traps for unwary lawyers).

[139] *See supra* note 88.

[140] *See supra* text accompanying note 128 (describing ambiguous legal exceptions).

[141] *See supra* notes 89-93 and accompanying text.

tion of collateral estoppel. Moreover, even if collateral estoppel apparently is applicable by virtue of the rules, the court still might not apply the doctrine, inasmuch as the court has broad discretion *not* to apply collateral estoppel.[142]

The end result is that the lawyer's extensive research and analysis takes an inordinate amount of time and thus translates into large costs for the client. What does the client receive in return? One thing he often does *not* receive is a reasonably reliable prediction as to whether the court will apply collateral estoppel. Thus, the client lacks the reasonably reliable professional opinion which he needs for peace of mind or to make informed choices regarding the future course of the litigation.

It may be impossible—and undesirable—to make the outcomes of collateral estoppel issues more certain than they are at present.[143] It is very possible and desirable, however, to simplify the tortuous and expensive methodology by which courts presently reach those outcomes.[144] Thus, while clients may not be entitled to more predictable collateral estoppel adjudication, they should not have to pay extra legal fees necessitated solely by an inefficient legal methodology.

In short, the present structure of the law of collateral estoppel harms clients by unfairly and unnecessarily driving up their legal costs.

B. Increased Burden on Courts

For the same reasons that current collateral estoppel jurisprudence increases client costs, it increases work for courts. Like attorneys, courts confronted with collateral estoppel issues must wade through a treacherous, time-consuming multi-step analysis.[145] This expenditure of precious judicial resources is not even justifiable on the grounds of necessity, because collateral estoppel issues can be resolved far more expeditiously

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[142] *See supra* notes 45-47 and accompanying text.

[143] *See infra* text accompanying note 215-16.

[144] *See infra* text accompanying notes 151-204 (describing proposed simplified methodology).

[145] *See supra* text accompanying notes 135-42 (describing required analysis).

without compromising the quality of the resolution.[146] This judicial waste is a significant detriment to the American public, given that its courts already are backlogged and overworked.[147]

V. Reinventing Collateral Estoppel: A Proposed Methodology

In light of the aforementioned drawbacks to collateral estoppel jurisprudence,[148] and the resulting detriments to society,[149] reform clearly is necessary. Specifically, collateral estoppel analysis must be purged of its present illogic and inefficiency, and restructured to achieve the objectives of collateral estoppel law.

To satisfy these criteria, this Article proposes a new two-prong methodology for addressing collateral estoppel issues. Under the proposed methodology, the court first frames the collateral estoppel issue in terms of its actual significance to the lawsuit, *i.e.*, by identifying the proposition that the estopping party wishes to preclude the party to be estopped from asserting or denying. Second, the court employs a multi-factor weighing test to decide whether to apply collateral estoppel, *i.e.*, whether to preclude the party to be estopped from making that assertion or denial.

Since today's courts often twist or ignore the black-letter rules to decide collateral estoppel issues based largely on balancing relevant factors,[150] the proposed methodology does no more than expressly implement an implicit process commonly used by today's courts. The proposed methodology therefore eliminates today's unnecessary, confusing and costly body of collateral estoppel rules, and yet dictates the same rationale and same results that courts often would reach even if those

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[146] *See infra* text accompanying notes 151-216 (describing substance and advantages of proposed approach to collateral estoppel issues).

[147] *See supra* note 3.

[148] *See supra* notes 52-131 and accompanying text.

[149] *See supra* text accompanying notes 132-47.

[150] *See infra* notes 173-83 and accompanying text.

rules purportedly were in effect. The proposed two-prong methodology therefore reduces the cost of legal services, promotes judicial economy, and more directly serves the objectives of collateral estoppel law.

A. Proper Identification of the Collateral Estoppel Issue

1. Framing the Collateral Estoppel Issue

As noted above, based on their misperception of collateral estoppel's preclusive effect, courts typically mischaracterize collateral estoppel issues.[151] Courts typically frame the issue in terms of whether to preclude the party to be estopped from relitigating the issue at stake.[152] In light of the practical role of collateral estoppel, however, courts instead should focus on whether to preclude the party to be estopped from making the assertion or denial at stake.[153]

In addressing whether it will preclude that assertion or denial, the court should forego a hypertechnical approach and instead simply ask whether it *should* do so, in light of all relevant considerations.

Ostensibly, this manner of framing collateral estoppel issues would be novel, but in reality it comports with an implicit practice common among today's courts. As noted in the following discussion, today's courts—in a clear departure from black-letter law—often focus from the outset on the ultimate issue of whether they should apply preclusion.

2. Black-letter Rules vs. Actual Practice: How Courts Approach Collateral Estoppel Issues

Currently, courts' ostensible framework for analyzing collateral estoppel issues consists of three general steps: (1) determining whether all collateral estoppel elements are present;[154] (2) if necessary, determining whether any legal excep-

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[151] *See supra* notes 50-59 and accompanying text.
[152] *See supra* notes 50-59 and accompanying text.
[153] *See supra* notes 50-59 and accompanying text.
[154] *See supra* note 94 and accompanying text.

tion is applicable;[155] and (3) if necessary, determining whether to exercise its discretion not to apply collateral estoppel.[156] The first two steps involve application of black-letter rules. By contrast, the third step enables the court to make a decision independent of, or even contrary to, the rules.

Under this framework, the court proceeds first to step one, in which the court must make absolute, black-and-white determinations: either each element exists, or it does not.[157] If all elements exist, the court can proceed to step two, in which it considers whether the case fits within any black-letter exception.[158] If no exception is applicable, the rules indicate that collateral estoppel is applicable.[159] Nevertheless, the court can advance to step three and determine, within its discretion, whether to buck the rules and not apply collateral estoppel.[160]

This framework ostensibly prevents the court, until step three, from focusing on considerations other than the rules themselves. Specifically, until step three, courts are prohibited from directly considering the extent to which preclusion would appropriately serve the objectives of collateral estoppel.[161] In reality, however, courts frequently ignore this prohibition, bypassing steps one and two and deciding not to apply collateral estoppel because its application somehow would be undesirable.

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[155] *See supra* note 88.

[156] *See supra* note 100 and accompanying text.

[157] *See, e.g.*, United States v. Stauffer Chem. Co., 464 U.S. 165, 171 & n.4 (1984) (noting that terms of legal exception require black-and-white determinations as to whether facts of case can be labeled in accordance with those terms); RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. a (1980) (noting that preclusion may be imposed only if all elements are present).

[158] *See supra* note 88.

[159] *See Stauffer Chem. Co.*, 464 U.S. at 165 ("The exception to the applicability of the principles of collateral estoppel for 'unmixed questions of law' arising in 'successive actions involving unrelated subject matter' does not apply here.").

[160] *See supra* note 88 and accompanying text.

[161] The collateral estoppel elements supposedly exist in order to implement the policies served by collateral estoppel. *See* Empire Fire & Marine Ins. Co. v. J. Transp., Inc., 880 F.2d 1291, 1295 (11th Cir. 1989); *supra* note 31. For this reason, it seemingly is improper for a court to trump the policy judgments embodied in those elements by ignoring those elements and making its own policy judgments.

In fact, even if the court recites the collateral estoppel test or other rules, the court still might ignore those rules and dispose of the issue based on its perception of how best to serve the objectives of collateral estoppel law.[162]

To illustrate, a court conducting step one often decides whether a given element exists based solely on its belief that collateral estoppel should or should not apply—regardless of whether the facts of the case reasonably fit within the language of the element.[163] For example, some courts effectively treat

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[162] For example, in United States *ex rel.* Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Blue Cross Blue Shield, Inc., 755 F. Supp. 1040, 1046 (S.D. Ga. 1990), the court stated:

> A court is permitted to use collateral estoppel where: 1) the issue at stake was identical to the one involved in prior litigation; 2) the issue in the prior litigation was actually litigated; and 3) the determination of the issue in the prior litigation was a necessary and critical part of the judgment in that prior litigation. Notably, one of the primary policies served by collateral estoppel—that the winning party should not have to fight anew a battle it has already won—is not applicable here. BC-GA was not a party to the [prior] *Prudential* litigation. In addition, the issue urged to be precluded in this [c]ourt is a pristine question of law. Last, BC-GA's fear that Stinson Lyons is engaging in forum-shopping does not apply; Stinson Lyons had filed this action long before the *Prudential* court rendered its decision. These circumstances all weigh against application of collateral estoppel doctrine in this instance.

Stinson, 755 F. Supp. at 1046 (citations omitted). Accordingly, the court refused to apply collateral estoppel. *Id.* Manifestly, the court's decision turned on factors other than the terms of collateral estoppel test recited by the court.

[163] For example, in Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1521 (10th Cir. 1990), the court stated:

> Their [res judicata's and collateral estoppel's] purposes are to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Were we to hold that Nord was denied the full and fair opportunity to litigate because of an allegedly erroneous legal ruling in Sil-Flo I, these doctrines would be eviscerated. Accordingly, we affirm the district court's dismissal of Sil-Flo II on the grounds of res judicata and collateral estoppel.

Sil-Flo, 917 F.2d at 1521 (citation omitted). The court's reasoning is manifestly flawed, however, as it puts the cart before the horse. According to *Sil-Flo*, elements are lacking because collateral estoppel should not and does not apply. *See id.* Under the black-letter scheme, however, collateral estoppel does not apply because its elements are lacking.

the requirement of a final prior judgment as a requirement that the prior judgment should have collateral estoppel's preclusive effect.[164] Similarly, other courts maintain that the finality requirement may mean only that the court sees no good reason for permitting the issue to be litigated again.[165] The fact that there is no good reason for permitting relitigation of an issue, however, has nothing to do with whether a prior judgment reasonably can be termed "final." That fact does not trouble these courts, however, because they simply are not interested in whether the prior judgment is "final." Rather, they are interested in whether preclusion is desirable. Thus, they use the purported technical requirement of a final judgment as a device for shifting their focus to whether preclusion is desirable.[166]

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[164] *See supra* note 71 and accompanying text (noting that some courts in effect define "final" prior judgment as one that should be accorded preclusive effect).

[165] *See* Gresham Park Community Org. v. Howell, 652 F.2d 1227, 1243 (5th Cir. Unit B 1981) ("'Finality' . . . may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.") (quoting Miller Brewing Co. v. Jos. Schlitz Brewing Co., 605 F.2d 990, 996 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980)); *supra* note 71 and accompanying text (noting that some courts consider prior judgment final if it is "sufficiently firm" that it should be accorded preclusive effect).

[166] This is not the only context in which courts manipulate an ostensible requirement by inevitably construing the verbal terms of the requirement to reach the result they desire. For example, consider an action brought by an injured seaman against a vessel owner for negligence or unseaworthiness under admiralty law. Suppose the vessel owner claims that he is entitled to limitation of liability. In that case, allocation of the burden of proof on the limitation issue depends upon whether the vessel owner had "privity or knowledge" of the dangerous condition that caused the plaintiff's injury. *See* Brister v. AWI, Inc., 946 F.2d 350, 355 (5th Cir. 1991). However, the "privity or knowledge" requirement has no real meaning, and is merely a device by which the court justifies the result it chooses to reach on the limitation issue:

> "Privity of Knowledge" . . . are phrases devoid of meaning. They are empty containers into which the courts are free to pour whatever content they will. The statutes might as well say that the owner is entitled to exoneration from liability or to limitation of liability if, on all the equities of the case, the court feels that the result is desirable; otherwise not.

Brister, 946 F.2d at 355. n.2 (quoting GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY, 877 (2d ed. 1975)).

A similar pattern emerges from courts' decisions under step two as to whether an exception is applicable. Courts sometimes ignore the literal terms of the exception and make their decision based on whether applying an exception in that case would advance the policies underlying collateral estoppel law. For example, in *United States v. Stauffer Chemical Co.*,[167] the United States Supreme Court addressed the applicability in that case of an established exception for specific "issues of law." The Court noted that the exception, by its terms, required the Court to decide whether the issue to be estopped was an "issue of law."[168] The Court frankly admitted, however, that it was not interested in making that decision. Rather than decide the applicability of the exception based on such labeling, the Court preferred to decide on the grounds that fairness and judicial economy mandated application of collateral estoppel.[169]

In short, at any stage of collateral estoppel analysis, a court might switch its focus from the terms of the black-letter rules to the broader inquiry into whether preclusion would be appropriate. Under the proposed approach, Courts would have express authorization to focus directly on the ultimate question of whether preclusion would be appropriate, whereas under the current approach, courts can do so only by ignoring their own purported rules.

The proposed approach eliminates formalistic and senseless rules that courts are anxious to circumvent, and directs analysis immediately to the concerns that actually drive courts' collateral estoppel decisions. As a result, the proposed methodology would save courts and lawyers substantial time.

Similarly, all of the rules of collateral estoppel might as well be condensed to a single rule saying that collateral estoppel will be applied if, on all the equities of the case, the court feels that the result is desirable; otherwise, it will not be applied.

[167] 464 U.S. 165 (1984).

[168] *Stauffer Chem. Co.*, 464 U.S. at 171.

[169] *Id.* at 171-72.

B. Multi-factor Inquiry

How is a court to decide whether it *should* apply collateral estoppel? By taking into account all relevant considerations, a court can determine whether collateral estoppel should be applied. Under the proposed methodology, courts do so by employing a flexible multi-factor inquiry that informs the court whether, on balance, preclusion is appropriate.

This process clearly differs qualitatively from the current black-letter approach. Under the current approach, collateral estoppel does not apply unless several prerequisites are satisfied; the absence of a single element nullifies the possibility of preclusion.[170] Under the proposed approach, by contrast, there are no prerequisites. Each factor militates against or in favor of preclusion, but no one factor is necessarily dispositive. Although the absence of a specific relevant fact can be significant, it cannot by itself negate the possibility of preclusion.

1. Rationale for the Multi-factor Test

Adoption of a multi-factor test is appropriate for three reasons. First, such a measure would clarify collateral estoppel analysis by granting the court explicit authority to balance various factors in the course of deciding collateral estoppel issues. Second, the multi-factor test would greatly simplify the research and argument required to address collateral estoppel issues, thereby saving clients money and courts time. Third, the multi-factor test would provide courts with maximum flexibility to effectuate the objectives of the law of collateral estoppel.

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[170] *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. a (1980) ("[P]reclusion may be imposed *only if*, as stated in § 27, the issue was the same as that involved in the present action and was actually litigated and essential to a prior judgment that is valid and final.") (emphasis added).

a. Explicit adoption of today's implicit multi-factor approach

Currently, collateral estoppel analysis prohibits the court from directly considering the appropriateness of preclusion[171] through the weighing of relevant factors until step three.[172] In reality, however, weighing pervades all three steps.

In conducting step one, courts engage in three kinds of weighing. First, courts occasionally use weighing to decide whether a given collateral estoppel element is present. For example, in jurisdictions that require the judgment in the prior litigation to have been final, courts often weigh various factors in assessing the finality of the prior judgment.[173] In addition, courts also frequently resort to weighing the "full and fair opportunity" requirement.[174] Moreover, according to the Restatement, in some cases, several factors should be considered in deciding whether the issues involved are the "same."[175] Second, courts occasionally ascribe unequal weight to the various elements in determining whether to find that the elements *as a whole* have been satisfied.[176] Third, courts occasionally

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[171] *See supra* text accompanying notes 159-61.

[172] Application of black-letter rules theoretically requires a court to determine whether the facts of the case fit within the words of the rule. *See* United States v. Stauffer Chem. Co., 464 U.S. 165, 171 & n.4 (1984) (discussing whether "issues of law" arise in successive cases as to warrant relitigation). In this process, flexible weighing of factors has no proper role.

[173] *See, e.g.*, Gresham Park Community Org. v. Howell, 652 F.2d 1227, 1243 (5th Cir. Unit B 1981) (determining whether prior judgment is final "turns upon such factors as the nature of the decision . . . the adequacy of the hearing, and the opportunity for review") (quoting Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962)); Miller Brewing Co. v. Jos. Schlitz Brewing Co., 605 F.2d 990, 996 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980).

[174] Courts can give greater or lesser weight to several different factors in determining whether the "full and fair opportunity" requirement has been satisfied. *See* Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1521 (10th Cir. 1990) ("Often, the inquiry will focus on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties.").

[175] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1980).

[176] *See In re* McWhorter, 887 F.2d 1564, 1567 (11th Cir. 1989) (stressing especial significance, when party to be estopped is defendant, of "full and fair oppor-

indicate that the collateral element test has been satisfied, not by its terms, but because circumstances weigh in favor of the application of collateral estoppel.[177]

Courts also implicitly weigh various factors in deciding whether an exception is applicable under step two.[178] Finally, courts explicitly and routinely weigh selected factors in deciding whether to decline to apply collateral estoppel pursuant to step three. Indeed, such weighing is the very essence of step three.[179]

Courts thus recognize the utility of weighing various factors to decide collateral estoppel issues. Similarly, the Restatement consistently invokes weighing to interpret black-letter rules, albeit without realizing that weighing effectively subsumes the text of those rules.[180]

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tunity" requirement); Hercules Carriers, Inc. v. Claimant, 768 F.2d 1558, 1580 (11th Cir. 1985) (stating that "most significant consideration in determining whether to invoke collateral estoppel is whether the party to be estopped had a full and fair opportunity to litigate the issue to be estopped") (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 328 (1979)).

The assessment of unequal weight to the different elements is completely inconsistent with the established rule that elements are *requirements* which either are or are not all satisfied in a given case. Elements either exist or they do not, and thus it makes little sense to think of the elements existing in varying degrees.

[177] *See supra* note 162 (citing United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield, Inc., 755 F. Supp. 1040, 1046 (S.D. Ga. 1990)).

[178] *See, e.g.*, North Ga. Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429, 437 (11th Cir. 1993) (determining whether to apply exception to avoid "inequitable administration of the tax laws," reguires courts to consider countervailing possibility of "inequitable administration of the law of collateral estoppel"), *aff'd*, 74 A.F.T.R.2d 94-7423 (D. Mont. 1994); *In re* Towe, 147 B.R. 545, 549 (Bankr. D. Mont. 1992) (exception to collateral estoppel exists where "equitable considerations compel a reexamination of the issue"); General Dynamics Corp. v. American Tel. & Tel. Co., 650 F. Supp. 1274, 1282 (N.D. Ill. 1986) (stating numerous factors relevant to whether court should decline to apply collateral estoppel because it would be unfair), *certification granted*, 658 F. Supp. 417 (N.D. Ill. 1987).

[179] *See* 18 WRIGHT ET AL., *supra* note 1, § 4426, at 267 (noting many factors and "individually particularized concerns of justice" that courts selectively consider in deciding not to apply collateral estoppel due to fairness or public interest concerns).

[180] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1980) (stating that several factors should be considered in deciding whether "same issues" require-

In two respects, however, courts' current weighing practices are less desirable than the explicit weighing mandated by the proposed methodology. First, today's courts do not use weighing often enough. In many cases, courts never engage in any weighing.[181] Under the cumbersome structure of black-letter law, courts initially must focus on the terms of the elements and exceptions rather than the factors that should guide collateral estoppel decisions.[182] Thus, in cases in which the court does adhere to the black-letter structure, it employs the weighing process only if and when it reaches step three.

Second, when courts do use weighing, they often fail to do so directly and expeditiously. Courts use weighing under steps one and two to explain why rules are or are not applicable,[183] *not* to address directly the ultimate question of whether it *should* apply collateral estoppel. Unfortunately, it simply makes no sense to use weighing for the former purpose but not the latter. Courts use weighing to assess the tricky balance between fairness concerns, the desire to reduce litigation, and other policy interests. If a court is concerned more with striking this balance than with the words of existing rules, it should not even pay lip service to those words or rules. Rather, the court should proceed immediately to consider whether preclusion would properly strike this balance.

Simply put, courts care a great deal about competing fair-

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ment has been satisfied); *id.* § 28 cmt. c (noting numerous factors for courts to consider in deciding whether to apply black-letter legal exception for certain issues of law that warrant new determination).

[181] *E.g.*, Still v. Michaels, 791 F. Supp. 248, 251 (D. Ariz. 1992) (stating that court rigidly and without elaboration finds collateral estoppel test satisfied).

[182] *See* United States v. Stauffer Chem. Co., 464 U.S. 165, 171 & n.4 (1984). Wright and Miller, for example, believe that courts must begin with black-letter rules. In their view, in special cases courts can consider the equities later in their analysis, but the general black-letter rules must be the linchpin of collateral estoppel analysis. *See* 18 WRIGHT ET AL., *supra* note 1, § 4416, at 143 ("The critical task is to define rules that . . . are both clear and just for most cases, and that incorporate levels of flexibility and discretion that permit just results in special cases without undermining the general rules.").

[183] *See, e.g.*, Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1521 (10th Cir. 1990) (finding "full and fair opportunity" requirement to be satisfied because, were court to find otherwise, purposes of collateral estoppel would be eviscerated).

ness and policy factors and very little about collateral estoppel rules, and thus tend to make their decisions on the former rather than the latter basis.[184] Since the rules play no true substantive role, they should not remain as formal verbal obstacles that a court must avoid or eviscerate in order to perform the weighing process. Accordingly, courts should eschew those rules, in form as well as substance.

Elimination of the current rules would be productive as well as theoretically satisfying; such a shortcut would simplify and clarify collateral estoppel analysis, thereby saving lawyers and courts a great deal of time and clients a great deal of money.

In short, courts should use a multi-factor weighing approach *explicitly* in *every case* instead of implicitly in some cases.

b. Simplicity

The multi-factor balancing approach is inherently simple to apply. Unlike the current approach, the proposed approach does not require that courts and attorneys waste time researching and sorting through the governing legal principles.[185] The factors listed below *are* those governing legal principles. That list being familiar and immediately apparent, there is nothing for courts or lawyers to research or sort through. Having effortlessly identified the applicable law, courts and lawyers then can turn their attention to the facts and equities of the case at hand.

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[184] *See* 1B MOORE & LUCAS, *supra* note 1, ¶ 0.441[3.-4] (describing the trend "toward viewing the doctrine of collateral estoppel generally as less a set of fixed rules and more a presumption to be followed *unless the court thinks that it would be fair to permit relitigation*") (emphasis added). *See also supra* note 166 (noting that courts use rules to reach results appropriate under equities of case without regard to terms of rules).

[185] *See supra* text accompanying notes 135-42 (discussing research and analysis required to master applicable legal principles under current approach to collateral estoppel).

c. *Flexibility*

By focusing the court's attention almost immediately on the facts of the case, the proposed approach provides the court with maximum flexibility to effectuate the objectives of collateral estoppel law. Only by examining the facts of a given case can a court determine whether application of collateral estoppel in that case will advance the objectives of collateral estoppel law. By prescribing an unobstructed, flexible factual inquiry, the proposed multi-factor approach facilitates such examination, thereby furthering the court's efforts to promote the objectives of collateral estoppel law.

2. *Factors Considered*

Although courts have not expressly recognized that collateral estoppel analysis should focus immediately on the factors pertinent to whether preclusion is appropriate in a given case, courts long have recognized what those pertinent factors are. Some are clearly reflected in black-letter rules.[186] Moreover, when courts have eschewed black-letter rules in favor of a more flexible discussion of the desirability of preclusion, they have identified other relevant factors.

The proposed methodology draws upon this collective wisdom in specifying the factors courts should consider under step two. Specifically, the proposed methodology contemplates that a court consider at least the following factors in determining whether, on balance, it should apply collateral estoppel: (1) the extent to which the assertion or denial to be precluded is inconsistent with the determination reached in the prior litigation;[187] (2) the relationship between the party to be estopped

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[186] *See supra* note 31 (noting that collateral estoppel rules reflect competing policy values).

[187] *See, e.g.*, Park Lane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (stating that purpose of collateral estoppel is to protect litigants from relitigating identical matters); North Ga. Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429, 438 (11th Cir. 1993) (noting that important policy of collateral estoppel is fulfilled when applied to matters already litigated); Collins v. Walden, 613 F. Supp. 1306, 1316 (N.D. Ga. 1985) (providing that collateral estoppel is intended to limit party to "one bite at the apple"), *aff'd*, 784 F.2d 402 (1986).

and the parties in the prior litigation;[188] (3) the extent to which the parties in the prior litigation had the opportunity and incentive to litigate the prior determination;[189] (4) differences in burdens of proof between the present and prior litigation with respect to the issue involved;[190] (5) intervening changes in the law;[191] (6) differences between the context in which the assertion or denial would be raised and the context in which the prior determination was made;[192] (7) the extent to which application of collateral estoppel otherwise would result in unfairness to the estopped party;[193] and (8) the effect that application of collateral estoppel would have on the public.[194]

These factors generally are neither surprising nor controversial. Courts long have sensed that these factors are helpful in determining the degree to which preclusion in a given case would be fair, efficient, or otherwise desirable.[195] The first factor is controversial, however, because it evidences a sharp distinction between the proposed methodology and the black-letter of the current law. This distinction is discussed next.

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[188] *See* Park Lane Hosiery Co., 439 U.S. at 326 (noting that collateral estoppel's purpose is fulfilled by preventing relitigation of matters by previously unsuccessful litigant or someone in "privy" with that litigant).

[189] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(5) & cmt. c (1980).

[190] *See id.* § 28 cmt. f (noting that differences in burden of persuasion between two cases is relevant to whether collateral estoppel is properly denied).

[191] *See id.* cmt. c ("[R]eexamination is appropriate if the change in the law, or other circumstances, are such that preclusion would result in a manifestly inequitable administration of the laws.").

[192] *See id.* (noting that application of collateral estoppel can be inappropriate if matter is raised second time in different context than it arose first time).

[193] *See, e.g., In re* Southold Dev. Corp., 136 B.R. 40, 42 (E.D.N.Y. 1992) ("[C]ollateral estoppel will not be applied when there is an 'overriding issue of fairness to a litigant.'") (quoting Blonder-Torgue Lab., Inc. v. University Found., 402 U.S. 313, 325 (1971)).

[194] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. h (1982) (noting that "due consideration of the interests of persons not themselves before the court in the prior action may justify relitigation" of matter otherwise precluded).

[195] *See supra* notes 187-94.

3. Replacing the "Same Issues" Requirement

The linchpin of the current black-letter approach is the requirement that the issue in the present litigation and the issue in the prior litigation be "the same." For three reasons, however, the proposed methodology contains no such requirement.

First, the proposed approach rejects prerequisites to the application of preclusion[196] in favor of factors to be weighed.[197] Second, in the final analysis collateral estoppel concerns preclusion of *assertions* or *denials*, not preclusion of relitigation of issues.[198] Finally, there is little utility and no certainty in having courts decide collateral estoppel issues based on the elusive distinction between "same" issues and merely similar issues.[199]

To be sure, the degree of similarity between matters previously determined and matters presently at issue is highly relevant to whether preclusion is appropriate. After all, collateral estoppel stems, in layman's terms, from the principle that the party to be estopped "deserves only one bite at the apple."[200] Although the proposed approach initially appears to abandon this principle by rejecting the "same issues" requirement, the proposed approach actually embodies this principle more than does the current approach. Unlike the current approach, the proposed approach recognizes that the party to be estopped can seek what amounts to a second bite at the apple even if there exist no two "same" issues as such. Specifically, the party to be estopped seeks an impermissible second bite at the apple to the extent that her desired assertion or denial is inconsistent with a determination made against her in prior litigation. For this reason, under the second step of the proposed methodology,

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[196] *See supra* note 32 (noting that collateral estoppel elements are prerequisites to application of preclusion).

[197] *See supra* notes 186-94 and accompanying text (listing factors to be weighed).

[198] *See* supra notes 50-59 and accompanying text.

[199] *See supra* notes 102-18 and accompanying text.

[200] Collins v. Walden, 613 F. Supp. 1306, 1316 (N.D. Ga. 1985), *aff'd*, 784 F.2d 402 (1986).

courts would place much weight on the degree of inconsistency between the prior determination and the assertion or denial that the estopping party seeks to preclude.

Although such a change ostensibly is radical, it actually comports with courts' existing practice. Notwithstanding black-letter emphasis on whether two issues may be labelled "the same," courts implicitly have recognized that it is often impossible and unnecessary to conclude absolutely that two issues are the same.[201] For example, whether or not a court is sufficiently confident to declare two issues "the same," it often will apply preclusion based on the less controvertible declaration that the issues are "substantially" the same.[202] In this manner, courts recognize that collateral estoppel decisions should depend on whether the two issues are similar enough to one another that preclusion may be appropriate, regardless of whether their similarity rises to the level of "sameness." Consciously or not, courts thus reject the notion that *sameness* is a collateral estoppel *requirement* and acknowledge that *similarity* is a collateral estoppel *factor*.

As noted above, collateral estoppel's preclusion of the assertion or denial of propositions is far more important than its preclusion of the relitigation of issues.[203] Accordingly, the proposed methodology focuses on the similarity of the propositions involved: courts should decide whether to preclude a party from asserting or denying a proposition based in part on how similar that proposition is to the proposition determined in the prior case. The more similar a proposition is with the determination in the prior case, the more appropriate it is to preclude the party from denying the proposition. The more inconsistent a proposition is with the prior determination, the more appropriate it is to preclude the party from asserting the proposi-

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[201] *See supra* notes 102-18 and accompanying text. *Cf.* United States v. Stauffer Chem. Co., 464 U.S. 165, 171 & n.4 (1984) (noting that it is often impossible and unnecessary to determine whether issue is one of "law" for purposes of legal exception) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28, cmt. b (1980)).

[202] *See supra* notes 117-18 and accompanying text.

[203] *See supra* notes 51-59 and accompanying text.

tion.[204]

In sum, courts should expressly discard the threshold inquiry into whether issues are the same, and instead weigh the relative similarity or inconsistency of the propositions at issue. By so doing, courts would avoid entanglement in verbal categorization and could focus more sharply on the appropriateness of applying collateral estoppel.

VI. Benefits of the Proposed Approach

The foregoing section, which primarily discussed *what* the proposed approach is, also touched on *why* it should be adopted. As discussed below in more detail, courts should adopt the proposed approach because it would trigger three significant benefits and no adverse consequences.

A. Elimination of Current Black-letter Collateral Estoppel Law

The proposed approach would replace the ineffectual structure of black-letter collateral estoppel rules.[205] Such a step is long overdue. That structure completely fails its essential purposes of providing a helpful blueprint for the resolution of collateral estoppel issues and fostering predictable results.[206] Moreover, individual rules fail to serve their purpose—carefully defining the conditions under which courts appropriately can apply collateral estoppel—because they turn excessively on semantic niceties unrelated to whether preclusion in a given case would be fair, effective or otherwise desirable.[207] Finally, the collective rules should be eliminated because often courts simply ignore them in order to decide collateral estoppel issues on more compelling grounds.[208]In light of the confusion creat-

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[204] *See supra* notes 54-56 and accompanying text.

[205] *See supra* text accompanying note 184.

[206] *See supra* notes 35-37 and accompanying text (describing purpose of black-letter collateral estoppel rules); *supra* notes 54-134 and accompanying text (describing unpredictability fostered by black-letter rules); *infra* note 226 (noting that limitations embodied in collateral estoppel rules are impossibly ambiguous).

[207] *See, e.g.*, United States v. Stauffer Chem. Co., 464 U.S. 165, 171 & n.4 (1984) (noting that words of black-letter exception do not satisfactorily resolve issue of whether application of collateral estoppel would be desirable).

[208] *See supra* notes 163-69 and accompanying text; *supra* notes 173-82 and

ed by its ineffectiveness and disfavorment, the black-letter approach, longstanding though it may be, must be abandoned.[209]

B. Express Authorization for Courts to Decide Whether to Apply Collateral Estoppel Based on Whether They Believe They Should Apply Collateral Estoppel

Having rejected contemporary black-letter law, the proposed approach provides the court with express authorization to resolve collateral estoppel issues based directly on the court's belief as to whether preclusion would be fair, effective, or otherwise desirable. In other words, the proposed approach allows a court to decide whether it *will* apply collateral estoppel based on whether it *should* apply collateral estoppel. Courts long have struggled to circumvent black-letter collateral estoppel law in order to decide collateral estoppel issues on this basis.[210] In the absence of black-letter rules, there is no reason for courts not to decide on this basis. The proposed methodology therefore enables, indeed directs, courts to decide collateral estoppel issues in their preferred manner.

C. Minimization of Clients' Legal Fees and Conservation of Judicial Resources

The third benefit of the proposed approach is the practical effect of its directness and clarity. By reducing enormously the research and analysis currently required to address a collateral estoppel issue,[211] the proposed approach would reduce clients' fees.[212] Similarly, by eliminating the complexity of the debate

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accompanying text.

[209] *Cf.* Edward Rafeedie, *Speedier Trials*, 21 LITIG. Fall 1994, at, 6, 6 ("Ancient procedures need not be sacrosanct. At the very least, their time-wasting features should be eliminated.").

[210] *See supra* notes 162-69 and accompanying text; *supra* notes 174-81 and accompanying text.

[211] *See supra* text accompanying note 185.

[212] *Cf.* Eli J. Richardson, *Demystifying the Federal Law of Attorney Ethics*, 29 GA. L. REV. 137, 176-77, 185-86 & n.163 (1994) (arguing that federal law of attorney ethics increases amount of time required for lawyers to research and address ethical issues, and clarification of this area of law would reduce clients' legal

over whether preclusion should apply, the proposed approach would reduce the amount of time for courts to resolve collateral estoppel arguments.[213] This, in turn, would benefit the general public by reducing the workload of its backlogged, beleaguered courts.[214]

Although these benefits cannot be quantified, they should not be underestimated. Savings of lawyers' and courts' time would be noticeable even in individual cases. The savings in individual cases would multiply rapidly, given that collateral estoppel issues arise so frequently. In the aggregate, the money saved by lawyers' clientele, as well as the time saved by courts, could be staggering.

D. Absence of Adverse Consequences

The only conceivable objection to the proposed approach is its unpredictability. To be sure, the proposed approach would produce unpredictable resolutions of collateral estoppel issues, in that it is so flexible and calls for very subjective judicial determinations.

For two reasons, however, unpredictability is not grounds for rejecting the proposed approach in favor of the current approach. First, the current approach itself is so convoluted, flexible and ambiguous that, as much as the proposed approach, it is incapable of producing predictable outcomes.[215] Thus, the proposed approach would not increase unpredictability in the resolution of collateral estoppel issues. Second, predictability is not possible in any event. A thoughtful determination of whether preclusion is appropriate is necessarily unpredictable, since it involves so many relevant factors and competing interests.[216] To take account of all of the policies implicat-

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fees).

[213] *Cf. id.*

[214] *See supra* note 3 (noting heavy caseload of courts); 18 WRIGHT ET AL., *supra* note 1, § 4416 (noting that litigation over uncertain and ambiguous collateral estoppel rules imposes administrative burdens on courts and parties).

[215] *See supra* notes 51-134 and accompanying text.

[216] *See supra* notes 184-94 and accompanying text (listing relevant factors); *supra* note 31 (noting that collateral estoppel law is intended to reconcile numer-

ed by a collateral estoppel issue, a court must sacrifice certainty. In short, unpredictability is a small price to pay for the flexibility necessary to achieve the goals of collateral estoppel law.

VII. CONCLUSION

Courts' current treatment of collateral estoppel issues suffers from four flaws that create substantial analytical confusion. First, courts fail to frame collateral estoppel issues in terms of collateral estoppel's practical preclusive effect. Second, the interplay between individual black-letter rules severely obfuscates collateral estoppel analysis. Due to that interplay, collateral estoppel questions involve too many layers of analysis and too many different rules which compete with and undermine one another.[217] Third, existing black-letter rules consist of vague verbal formulations, the ambiguity of which is only increased by subtests intended to correct such ambiguity.[218] Fourth, uncertainty is accented by courts' tendency to depart from black-letter rules in order to make decisions based on their subjective judgment as to whether application of collateral estoppel would be appropriate.[219]

For these four reasons, the existing structure of black-letter rules is incapable of yielding consistent or predictable outcomes to collateral estoppel questions. Thus, that structure fails to produce the desired benefit of using black-letter rules—predictability.[220] The rules therefore fail to justify their very existence and should be eliminated.[221]

Courts' haphazard and confusing treatment of collateral

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ous competing policies).

[217] *See supra* notes 68-100 and accompanying text.

[218] *See supra* notes 102-26 and accompanying text.

[219] *See supra* notes 130-34 and accompanying text; *supra* notes 164-70 and accompanying text.

[220] *See supra* note 206 (citing sources which note that purpose of black-letter collateral estoppel rules is to foster analytical structure and predictability, as well as sources explaining that rules fail of this purpose).

[221] *See supra* text accompanying notes 205-09 (discussing proposed elimination of existing black-letter rules).

estoppel, far from being merely analytically unsatisfying, is costly to society. Clients must pay greater legal fees for their lawyers to research, analyze and argue collateral estoppel issues.[222] In turn, courts must spend more time unraveling these arguments to resolve these issues, thereby consuming more of the public's precious judicial resources.[223]

Courts' tendency to resolve collateral estoppel issues flexibly makes little sense under the current black-letter regime, because it is inconsistent with the regime's overall goal and individual rules.[224] However, flexible and subjective adjudication is the optimal manner of achieving the objectives of collateral estoppel law. Collateral estoppel law is intended to strike the delicate, subjective balance of competing policy interests implicated in collateral estoppel issues.[225] Existing black-letter rules impede that balancing process, however, by requiring courts to focus on verbal categorization and semantic niceties rather than the interests at stake.[226] If courts would simply discard the stifling black-letter approach, they would be free to perform, without obstacle, the balancing contemplated by collateral estoppel law.

For these reasons, this Article proposes a new methodology for resolving collateral estoppel claims. Under the methodology, the court first phrases the collateral estoppel issue in terms of its actual significance to the case at bar: should the court preclude the party to be estopped from making the assertion or denial that the estopping party seeks to preclude? Next, the court flexibly assesses all relevant factors to decide, based on its subjective judgment, whether it should preclude that asser-

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[222] *See supra* notes 135-44 and accompanying text.

[223] *See supra* notes 145-47 and accompanying text.

[224] *See supra* note 171 (noting that flexibly weighing relevant factors is inappropriate manner of construing rules).

[225] *See supra* note 31 and accompanying text.

[226] *See* United States v. Stauffer Chem. Co., 464 U.S. 165, 171 (1984) (noting that black-letter rules necessitate unhelpful exercises in verbal categorization); *see also* 18 WRIGHT ET AL., *supra* note 1, § 4416, at 137. As Wright and Miller note, the black-letter rules created to resolve this conflict have been far from perfect: "So many limitations have emerged in such ambiguous forms that it seems impossible to achieve any statement that is both graceful and complete." *Id.*

tion or denial.

Unlike existing collateral estoppel law, the proposed approach is simple, pragmatic, and direct. Accordingly, it would facilitate analysis and resolution of collateral estoppel questions, thereby saving clients money and courts time.[227] Most important, it would finally fulfill the goal of collateral estoppel law, namely, striking the delicate balance between the litigants' and the public's respective interests in litigating or not litigating the matters at issue. In this manner, the proposed approach truly would reinvent the ancient doctrine of collateral estoppel.

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[227] *See supra* text accompanying notes 213-15.

MISSISSIPPI COURTS: 1790-1868

Michael H. Hoffheimer[*]

Table of Contents

Introduction 100
I. Courts in the Mississippi Territory (1790-1817) 102
II. Courts under the Constitution of 1817 116
Supreme Court 119
Circuit Courts 121
Court of Chancery 125
Probate Courts 126
County Courts 127
Justices of the Peace 129
Courts Martial 133
Gaps and Loopholes 136
III. Courts under the Constitution of 1832 138
High Court of Errors and Appeals 140
Circuit Courts 143
Superior Court of Chancery and Inferior Courts of Chancery 148
Courts of Probate 153
Criminal Courts 155
Boards of Police 157
Justices of the Peace 157
Mayor's Courts 160
Courts Martial 161

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IV. Courts During and After the Civil War 162
County Courts 167
Justices of the Peace 168
Probate Courts 169
Military courts 169
Epilogue 169

INTRODUCTION**

Mississippi courts and lawmakers regularly confront questions about the proper powers and limits of the Mississippi state courts.[1] Understanding the history of state court juris-

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** Please note that although the BLUE BOOK requires that citations include an indication when statutes have been amended or repealed, almost all Mississippi positive law cited in this Article has been implicitly repealed or amended—as have the Articles of the Confederation—and it would be sophomoric to indicate this fact in each case. Furthermore, because of the nature and dates of many citations in this Article, traditional BLUE BOOK format is modified in some places to aid the reader in easily locating and understanding these sources.

[1] A recent example was the problem presented by the need for an intermediary court of appeals. Because the state constitution vests in the supreme court "jurisdiction as properly belongs to a court of appeals," MISS. CONST. art. VI, § 146, it was questionable whether the legislature had the authority to give appellate jurisdiction to an intermediary court. Rather than amend the constitution, legislation established intermediary courts of appeals that receive jurisdiction by assignment from the supreme court. *See* MISS. CODE ANN. § 9-4-3(1) (Supp. 1994). It remained questionable, nevertheless, whether this scheme violated inherent constitutional limits on the legislature's power to establish "other *inferior* courts." MISS. CONST. art. VI, § 172 (emphasis added). The term "inferior" is now loosely used to indicate courts lower than a supreme court. *See* BLACK'S LAW DICTIONARY 700 (6th ed. 1990). At one time, however, the term "inferior courts" designated special courts of limited original jurisdiction below the circuit and chancery court level. Circuit and chancery courts were originally courts of *superior* jurisdiction. Act, to Reduce into One, the Several Acts and Parts of Acts, Concerning the Establishment, Jurisdiction and Powers of the Superior Courts of Law, June 1822 Miss. Laws 25-76. The Mississippi courts repeatedly addressed the issue of the meaning of "inferior" courts in the 1800s. *See generally* Houston v. Royston, 8 Miss. (7 Howard) 543, 552 (1843) (holding that vice chancery court of limited original jurisdiction was constitutional as "inferior" court when it had special limited jurisdiction concurrent with chancellor, and when cases could be removed to the chancellor as well as appealed to High Court of Errors and Appeals by writ of certiorari); Thomas v. State, 6 Miss. (5 Howard) 23, 28 (1840) (ruling that criminal court was constitutional as "inferior" court where cases were reviewable in circuit court by writ of certiorari).

In Marshall v. State, 662 So. 2d 566 (Miss. 1995), two criminal appellants

diction would often help answer such questions,[2] but there is no good discussion of the older court systems in Mississippi, and many of the primary legal sources are not easy to find.[3]

The purpose of this Article is to describe the evolution of the legal organization of territorial and state courts in Mississippi from the establishment of the Mississippi territory in 1790 up to the time of the adoption of the post-Civil War Constitution of 1868.[4] Mississippi experienced several forms of government during this period, adopted and amended two state constitutions, and attempted to sever legal ties to the United States. Despite important changes to the courts, the structure of the local court system exhibited remarkable legal continuity, and many of today's jurisdictional problems have their roots in the earlier court systems.

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objected to the assignment of their cases and challenged the constitutional validity of the new court of appeals. The appellants argued both that they had a right of appeal to the supreme court and that the court of appeals was not an "inferior court." *Marshall*, 662 So. 2d at 567. Rejecting both arguments, the supreme court held: "The Court of Appeals is clearly an inferior court and the Legislature had full constitutional authority to establish such inferior court." *Id.* at 568.

Justice Smith's cogent and well-reasoned opinion for the court drew heavily on the *Thomas* case for authority that a court's "inferior" status is determined solely by its relation to the supreme court. *Id.* at 572. Likewise, Justice Smith found that the court of appeals is "inferior" under the approach adopted in *Houston*. *Id.*

[2] Legal history offers a clue as to why there is a statutory grant of jurisdiction to circuit courts to issue injunctions, MISS. CODE ANN. § 9-1-19, under a constitutional regime that purports to vest chancery courts with "full" equity jurisdiction, MISS. CONST. art. VI, §§ 156, 159. *See infra* note 102.

[3] Not even the University of Mississippi Law Library has a complete set of the session laws. Furthermore, the version of the state constitutions in widest circulation, THE CONSTITUTIONS OF MISSISSIPPI AS ORIGINALLY ADOPTED (1982), omits amendments, some of which profoundly altered the jurisdiction of the courts.

[4] Though Mississippi was occupied by United States troops during the years immediately after the war, pro-slavery whites remained in control for several years. The authority of legislation and judicial decisions from these years was not questioned even after Reconstruction, when the court would denounce the legitimacy of the Reconstruction court. *See* Lusby v. Kansas City, M. & B.R., 19 So. 239, 242 (Miss. 1896) (rejecting authority only of volume 42 of Mississippi Reports).

I. COURTS IN THE MISSISSIPPI TERRITORY (1790-1817)

The Articles of Confederation (1777) did not expressly grant the central government authority to hold or administer lands apart from the constituent states, nor did the Articles specifically prohibit such federal territorial government.[5] The drafters may have assumed that all land would be held as part of one of the states;[6] nevertheless, under the Treaty of Paris (1783), Great Britain ceded to the United States (not to individual states) the western territory when Britain acknowledged the middle of the Mississippi River as the boundary of the United States.[7] By this treaty, Britain conveyed territory (to the extent it had the power to do so)[8] that would eventually comprise the states of Kentucky, Tennessee, Ohio, Indiana, Illinois, and Alabama. Britain also conveyed the Michigan Territory, which included land that would become the bulk of the state of Mississippi. The treaty did not, however, include the stretch of the Gulf Coast, then part of Spanish Florida, which would be seized by the United States in 1810 and ceded by Spain (only after Mississippi was admitted as a state) in 1819.[9]

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[5] *See* ARTICLES OF CONFEDERATION art. IX, *reprinted in* U.S.C.A. Const. Art. I, at 12-13 (West 1987) (territorial government is not included in list of powers expressly forbidden to central government in last paragraph of article IX).

[6] This seems a fair inference from the fact that the Articles expressly provided that in disputes between states tried by Congress, "no State shall be deprived of territory for the benefit of the United States," *id.* at 11, and from the fact that the Articles explicitly provided for the admission of Canada into the Union but made no provision for autonomous territories. *Id.* Const. Art. XI, at 13.

[7] Treaty between the United States of America and His Britannic Majesty, Sept. 3, 1783, art. II, *in* FREDERICK E. HOSEN, UNFOLDING WESTWARD IN TREATY & LAW: LAND DOCUMENTS IN UNITED STATES HISTORY FROM THE APPALACHIANS TO THE PACIFIC, 1783-1934, at 32 (1988).

[8] The Treaty ignored the claims of other sovereigns or the native American occupants. It is notorious that the westward expansion of the United States paid little attention to the sovereign claims of the indigenous peoples, and the laws established to regulate the territories provided for the elimination of the Native American residents. *See, e.g.*, Northwest Ordinance of 1787 § 8, *reprinted in* U.S.C.A. Const. Art. I, at 19 (West 1987) [hereinafter Northwest Ordinance] (stating that "the governor shall . . . proceed, from time to time, as circumstances may require to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships . . . .").

[9] The United States recognized Spain's territorial claims to West Florida.

The first federal law to govern the western territory, the Northwest Ordinance,[10] provided the model for local governments throughout the new territories. Adopted under the Articles of Confederation in 1787, the Northwest Ordinance established a provisional government in the territory north of the Ohio,[11] expressly imposed the common law,[12] and provided for the appointment of federal officers, including "a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction."[13] Until the creation of a General Assembly, the judges as well as the Governor had legislative powers.[14] The General Assembly was

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Treaty between the United States of America and Spain, Oct. 27, 1795, *in* HOSEN, *supra* note 7, at 49, 50. Fifteen years later, the United States seized the territory of West Florida and annexed it militarily to the Orleans Territory as announced in a Presidential Proclamation. A Proclamation by the President of the United States of America Regarding the Territory South of the Mississippi Territory and Eastward of the River Mississippi and extending to the River Perdido, Oct. 27, 1810, *in id.* at 79, 80. It was subsequently joined to the Mississippi Territory. Act to Enlarge the Boundaries of the Mississippi Territory May 14, 1812, *in id.* at 7. Spain formally ceded the territory two years after the admission of Mississippi to statehood. Treaty between the United States of America & Spain, Feb. 22, 1819, art. II, *in id.* at 109, 110.

[10] Northwest Ordinance, *supra* note 8, § 5, at 18.

[11] The legislation envisaged the ultimate formation of new states out of the Territory "at as early periods as may be consistent with the general interest." *Id.* § 13, at 20, but it also provided for more immediate government, including authorizing the subdivision of the territory into two districts. *Id.* § 1, at 17, and authorizing interim government by means of governor and judges until the formation of a General Assembly. *Id.* §§ 5, 9-11, at 18-20.

[12] The common law and some of its familiar procedures were obviously recognized as rights enjoyed by the residents: "[t]he inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law." *Id.* art. II, § 14, at 21. The Ordinance also contained positive laws regulating testate and intestate succession. *Id.* § 2, at 17-18.

[13] *Id.* § 4, at 18. The judges were required to have a freehold estate in at least five hundred acres and held their commissions "during good behavior." *Id.*

[14] The terms of the ordinance gave the majority of the governor and judges lawmaking power but seemed to limit such power to the adoption of legislation in force in a state.

> The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district,

granted "authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in [the Northwest] ordinance."[15]

> and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress . . . .

Id. § 5, at 18. Political opponents in the territory criticized Governor Sargent (a federalist appointee) for, among other things, promulgating entirely new laws rather than adopting them from another state. JOHN R. SKATES, MISSISSIPPI: A BICENTENNIAL HISTORY 57 (1989).

The Governor acknowledged this criticism but expressed his intention of continuing to participate in new lawmaking, "though . . . I would prefer exact adoption from any of the original states whenever such provision might sufficiently apply." Governor Winthrop Sargent, Address to Territorial Judges (May 5, 1800), *in* 1 THE MISSISSIPPI TERRITORIAL ARCHIVES 1798-1803: EXECUTIVE JOURNALS OF GOVERNOR WINTHROP SARGENT & GOVERNOR WILLIAM CHARLES COLE CLAIBORNE 231 (Dunbar Rowland ed. 1905) [hereinafter MISSISSIPPI TERRITORIAL ARCHIVES]. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 158-59 (2d ed. 1985) (discussing territories' widespread practice of copying statutes from states).

The Governor's political enemies also made much ado of the fact that one of his provisional criminal statutes punished arson by forfeiture of all estates in the territory. This was thought to conflict with the constitutional prohibition of "Forfeiture except during the Life of the person Attainted," U.S. CONST. art. III, § 3, or the prohibition of excessive fines, *id.* at amend VIII. *See* petition presented to Congress, *quoted in* ROBERT LOWRY & WILLIAM H. MCCARDLE, A HISTORY OF MISSISSIPPI FROM THE DISCOVERY OF THE GREAT RIVER BY HERNANDO DESOTO INCLUDING THE EARLIEST SETTLEMENT MADE BY THE FRENCH, UNDER IBERVILLE, TO THE DEATH OF JEFFERSON DAVIS 175-76 (1891). The Governor responded to this criticism by accepting responsibility for the error and working promptly towards repeal of the statute. *See* Governor Winthrop Sargent, Address to Territorial Judges (May 5, 1800), *in* 1 MISSISSIPPI TERRITORIAL ARCHIVES, *supra*, at 230.

Problems of this sort were, perhaps, inevitable, given the lack of legal training of the Governor and first judges. The Governor was evidently also handicapped by the lack of access to laws from other jurisdictions. In a letter to the Secretary of State of September 29, 1798, he had written, "[f]or the Laws of the different states, I repeat my request, and for seals, stationary [sic], and blank Commissions also." MISSISSIPPI TERRITORIAL ARCHIVES, *supra*, at 54.

Negative evaluations of Governor Sargent colored redeemer historiography. *See, e.g.*, LOWRY & MCCARDLE, *supra* at 171; 1 J.F.H. CLAIBORNE, MISSISSIPPI, AS A PROVINCE, TERRITORY AND STATE, WITH BIOGRAPHICAL NOTICES OF EMINENT CITIZENS 203, 209 (1880). *But see* DUNBAR ROWLAND, WINTHROP SARGENT: FIRST GOVERNOR OF MISSISSIPPI TERRITORY, *in* MISSISSIPPI TERRITORIAL ARCHIVES, *supra*, at 12.

[15] Northwest Ordinance, *supra* note 8, § 11, at 20. The General Assembly included the Governor (appointed by Congress), a House of Representatives (elected by resident males owning fifty or more acres of land who were either citizens

Government for the first southern territory was established in 1790, after the adoption of the United States Constitution.[16] Legislation established one district south of the Ohio out of land ceded by North Carolina and provided that:

> the government . . . shall be similar to that which is now exercised in the territory northwest of the Ohio; except so far as is otherwise provided in the conditions expressed in . . . 'An act to accept a cession of the claims of the State of North Carolina, to a certain district of western territory.'[17]

The exception, cross-referenced so elliptically, was the federal guarantee that no emancipation of slaves would take place in the southwest.[18]

Further legislation in 1798 establishing the Mississippi Territory was similar, but it contained two significant differences. It authorized the establishment of a government in the form that now existed in the Northwest Territory, and (as now permitted under the Constitution[19]) it granted the President pow-

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of a state or residents of the district for two years), and a Legislative Council (consisting of five persons selected by Congress from a list of ten nominees submitted by the territorial House of Representatives). *Id.* §§ 3, 9, 11, at 18-20.

[16] The source of federal territorial government in Mississippi is always identified with the establishment of the Mississippi Territory. *See supra* text accompanying notes 8-15. The Act for the Government south of the Ohio River was presumably intended to govern only those lands ceded by North Carolina, but the legislation establishing the government in the territory provided broadly for the "territory south of the river Ohio," which arguably included all lands subject to federal dominion not included in the Northwest Ordinance. Act for the Government of the Territory of the United States, South of the River Ohio, Sec. 1, May 27, 1970, *in* HOSEN, *supra* note 7, at 45.

[17] *Id.*

[18] The legislation accepting the cession of claims from North Carolina provided for government in the new federal territory "in a manner similar to that which they [Congress] support in the territory [north]west of the Ohio . . . *Provided always*, That no regulations made or to be made by Congress, shall tend to emancipate slaves." Act to accept a Cession of the Claims of the State of North Carolina to a Certain District of Western Territory, Apr. 2, 1790, *in* HOSEN, *supra* note 7, at 41, 44. This exception to the operation of the terms of the Northwest Ordinance was necessary to preserve slavery, because the Northwest Ordinance had provided, "[t]here shall be neither slavery nor involuntary servitude in the [northwest] territory. . . ." Northwest Ordinance, *supra* note 8, art. VI, § 14, at 23.

[19] The Constitution provided for presidential appointment of officers. U.S.

ers to effectuate the legislation and to appoint territorial officers.[20] By the time the Mississippi Territory was established, Congress had authorized a single territorial judge to hold court in the absence of others.[21]

Only one of the three judges first appointed for the Mississippi Territory lived in the territory, and due to delays in appointments and difficulties in travel, the other two arrived in the Territory in 1799.[22] The first governor, Winthrop Sargent, felt that the legal void required emergency steps. Without any authority other than "imperious Necessity,"[23] he announced

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CONST. art. II, § 2.

[20] Act for an Amicable Settlement of Limits with the State of Georgia, and Authorizing the Establishment of a Government in the Mississippi Territory, April 9, 1978, *reprinted in* HOSEN, *supra* note 7, at 59. The Act provided:

> hereby is constituted one district, to be called the Mississippi Territory: and the President of the United States is hereby authorized to establish therein a government in all respects similar to that now exercised in the territory northwest of the river Ohio, excepting and excluding the last article of the ordinance made for the government thereof by the late Congress . . . and by and with the advice and consent of the Senate to appoint all the necessary officers therein.

Id.

[21] Act of May 8, 1792, § IV, *in* STATUTES OF THE MISSISSIPPI TERRITORY; THE CONSTITUTION OF THE UNITED STATES, WITH THE SEVERAL AMENDMENTS THERETO; THE ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES, NORTH-WEST OF THE RIVER OHIO; THE ARTICLES OF AGREEMENT AND CESSION, BETWEEN THE UNITED STATES AND THE STATE OF GEORGIA; AND SUCH ACTS OF CONGRESS AS RELATE TO THE MISSISSIPPI TERRITORY 40 (1816) [hereinafter STATUTES OF THE MISSISSIPPI TERRITORY]. Such judges were termed "supreme or superior judges of the said territories." *Id.*

[22] The third judge appointed apparently did not stay long in the territory. *See generally* 2 DUNBAR ROWLAND, HISTORY OF MISSISSIPPI THE HEART OF THE SOUTH 441 (1925) (noting that two judges with little legal training were left after one judge quit). A few years later, Governor Claiborne would write to Madison:

> The Chief Justice, Mr. Lewis [who was appointed later] is a learned lawyer and a man of talents. But his colleagues, Messrs. Tilton and Bruin, (however amiable in private life), have not had the training for the bench. The former, it is said, read law for a few months, but never practiced. The latter was brought up a merchant. . . If these gentlemen, or either of them, should resign, as is now rumored, I respectfully urge the appointment of thoroughly trained lawyers of the highest character.

Letter from Governor Claiborne to James Madison (Jan. 8, 1802), *in* LOWRY & MCCARDLE, *supra* note 14, at 185.

[23] Governor Sargent's own term. Letter from Governor Sargent to Timothy

appointments of "Conservators of the peace" to serve until the arrival of another judge whose presence would make it possible to commission them as Justices of the peace.[24] He ordered these conservators to keep the peace and to sit regularly to try misdemeanors as a Court of General Quarter Sessions of the peace. Two conservators could sit as a sort of magistrate court to hear accusations of felonies and were authorized—in disregard of the Constitution[25]—to hold suspects for trial.[26] Already assuming that the three territorial judges were planning to sit as a Supreme Court of the Mississippi Territory, the governor ordered the conservators to confine such suspected felons pending trial by "the Supreme Court of the Territory."[27]

The governor thus established an embryonic court system modeled on the court system in the Northwest Territory where he had served as secretary for over a decade.[28] Under the 1788 Code for the Northwest Territory, each county had courts of quarter sessions (with criminal jurisdiction), courts of common pleas (with general civil jurisdiction), and probate courts.[29] Perhaps the governor felt obligated to duplicate the structure of those courts because of the congressional mandate to establish

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Pickering (Sept. 29, 1798), *in* MISSISSIPPI TERRITORIAL ARCHIVES, *supra* note 14, at 53.

[24] Winthrop Sargent, *Information to the Inhabitants of the Mississippi Territory* (Sept. 9, 1798), *in id.* at 42.

[25] U.S. CONST. amend. V. ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

[26] Winthrop Sargent, *Information to the Habitants of the Mississippi Territory* (Sept. 9, 1798), *in* MISSISSIPPI TERRITORIAL ARCHIVES, *supra* note 13, at 43 ("[U]pon Testimony of two Creditable [sic] Witnesses, that a Complaint is well founded, [two Conservators] may issue a precept directed to the Sheriff, to apprehend the Felon and him Commit to close Confinement to answer for his crime, before the Supreme Court of the Territory next to be holden after such Commitment, within the Said District.").

[27] *Id.*

[28] Dunbar Rowland, *Winthrop Sargent: First Governor of Mississippi Territory*, *in* MISSISSIPPI TERRITORIAL ARCHIVES, *supra* note 14, at 10. The Secretary served as chief executive in the absence of the governor, and Rowland states that Governor Sargent often acted as governor. *Id.*

[29] James L. Elder, *Growing Pains under the Northwest Ordinance*, *in* THE LAW IN SOUTHWESTERN OHIO 10-11 (George P. Stimson ed. 1972).

"government in all respects similar to"[30] that in the Northwest Territory.[31] Perhaps he was just most familiar with that organization. As chief executive, the governor stood on firmer legal ground in authorizing military courts in the absence of the judges—and the military courts were thus arguably the first lawfully established courts in the territory.[32]

With the arrival of a second judge, the governor and judges could sit as the provisional legislature.[33] This provisional legislature provided that the judges would sit as a territorial Supreme Court with trial jurisdiction over serious crimes, appellate jurisdiction, and power to convene the grand jury.[34] Throughout the territorial period, the chief legal distinction was that between superior courts (made up of the territorial judges appointed by the President as authorized by act of Congress) and inferior courts (made up of justices commissioned by the territorial governor). These various judges sat as different "courts" depending on the kind of case—and even the posture of the proceedings. The judges of the superior courts served for life; the justices of the inferior courts served for a term or at

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[30] *See supra* note 20.

[31] I am not sure why the Northwest Territory itself borrowed so slavishly the forms of the English common law court system. Perhaps this resulted from a literal reading of the Ordinance's language. Northwest Ordinance, *supra* note 8, art. II, § 14, at 21 ("The inhabitants of the said territory, shall always be entitled to the benefits of . . . judicial proceedings according to the course of the common law.").

[32] Specifically, the governor had ordered that:

> If any officer shall neglect his duty, or violate any of the rules and regulations now, or hereafter to be made for the government of the militia, he shall be heard tried and sentenced by a court martial.
>
> Courts martial may be appointed by the commander in chief, or the commandants of Legions, but the commander in chief reserves to himself the power of approving and carrying into effect, sentences of courts martial, whereby the punishment shall be capital or an officer cashiered.

Order for Regulation of Militia (Sept. 8, 1798), in MISSISSIPPI TERRITORIAL ARCHIVES, *supra* note 14, at 38-39.

[33] Even though federal legislation provided for three judges, there were usually only two territorial judges present during most of the period of the territory. WILLIAM B. HAMILTON, ANGLO-AMERICAN LAW ON THE FRONTIER: THOMAS RODNEY & HIS TERRITORIAL CASES 72-73 (1953).

[34] ROWLAND, *supra* note 22, at 441.

the pleasure of the governor.[35]

Territorial legislation confirmed the governor's appointment of justices of the peace and authorized the appointment of justices for Courts of General Quarter Sessions (with criminal jurisdiction) and for Courts of Common Pleas (with general civil jurisdiction).[36] The names and organization of the courts, patterned after the system in the Northwest, betrayed the influence of Blackstone and the extraordinary prestige enjoyed in Mississippi by English common-law precedent.[37] To be sure, there was no court of King's Bench, but the territorial judges sitting as the supreme court played the role of King's Bench—with superior, supervisory review by common-law writ process over all the inferior courts. Indeed, one of the judges of the supreme court explicitly compared the role of his court to that of the King's Bench.[38]

The inferior courts were courts of record with broad jurisdiction.[39] At first justices were commissioned separately either

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[35] The governor revoked a man's commission as a Justice and also his commission as lieutenant in the militia after he was indicted for defacing a public record. MISSISSIPPI TERRITORIAL ARCHIVES, *supra* note 14, at 328-29. The governor appointed the attorney general and the clerk of the Supreme Court of the Territory. *Id.* at 174. He also sought to control the admission of attorneys to the bar. *See* Letter from the Governor to Daniel Tilton, Territorial Judge, (May 23, 1799), *in id.* at 147.

[36] ROWLAND, *supra* note 22, at 441. Jurisdiction included "pleas of assize, scire facias, replevins, and [power to] hear and determine all manner of pleas, actions, suits and causes of a civil nature, real, personal and mixed." *Id.* at 441-42.

[37] "In Mississippi there was no expression of a sentiment of hostility to the common law and no effort to chop off the authority of English precedents at any terminal date." HAMILTON, *supra* note 33, at 118. The untarnished prestige of the common law in the Mississippi territory contrasted sharply with the bitter resistance to its reception in the Orleans territory and with the hostility to the common law experienced in the north—as witnessed by the codification movement and the successful passage of legislation "repealing" the common law in some states. *See id.* at 117. Judge Rodney clearly expressed his admiration for the common law in his charge to Grand Jury (Jan. 25, 1808). *Id.* at 335-36.

The continuing eminence of Blackstone among practitioners in the young state is evident in one of Joseph G. Baldwin's sketches. *See* JOSEPH G. BALDWIN, THE FLUSH TIMES OF ALABAMA & MISSISSIPPI 233 (1974).

[38] Letter of Thomas Rodney to James Madison (Jan. 23, 1805), *in* HAMILTON, *supra* note 33, at 72 n.28.

[39] The broad, original civil jurisdiction is recited in the commission of justices

as justices of the peace (with criminal jurisdiction) or justices of the common pleas (with civil jurisdiction).[40] But from the start, citizens often held commissions as both[41] and would sit as criminal and civil courts during alternate weeks,[42] with the same clerks and officials working for both courts.[43] It is no wonder that after the formation of counties, such justices when sitting in counties, were often referred to simply as county courts.[44]

Most areas of the territory did not have sufficient population to warrant permanent local courts. But the more populous areas needed more permanent judicial institutions than the itinerant panels of justices provided. Accordingly, as early as 1805, two years after the incorporation of Natchez, the legislature established a Mayor's Court with jurisdiction over civil cases up to five hundred dollars.[45] This court's summary process against debtors proved, perhaps, too efficient. A public meeting eventually denounced the court, and the grand jury

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of common pleas. *See* MISSISSIPPI TERRITORIAL ARCHIVES, *supra* note 14, at 241.

[40] *See, e.g., Appointments* (May 6, 1979), *in id.* at 145-46.

[41] *See id.* (indicating that the first justices of the peace for Pickering County were simultaneously its first justices of common pleas).

The first justices of the peace for Washington County also sat as Court of General Quarter Sessions of the peace. All but one (who was appointed probate judge) were also commissioned as justices of the common pleas, which sat in panels of three. *Id.* at 239, 240-41. I should point out that the Washington county referred to was not Washington County, Mississippi, but rather a county contiguous with the Washington District in the eastern Mississippi Territory. *See id.* at 238. Washington County, Mississippi, like most of the delta was unsettled at this time and was not formed until 1827, when it received a full complement of county courts and officials. Even at that late date it had only 170 property owners. BERN KEATING, A HISTORY OF WASHINGTGON COUNTY, MISSISSIPPI 22 (The Greenville Jr. Auxiliary 1976).

There was similar overlap in the commissions of justices in Adams County. *See* MISSISSIPPI TERRITORIAL ARCHIVES, *supra* note 14, at 130, 133, 241.

[42] *See The Scheduling Orders, in id.* at 127, 145, 238.

[43] *See id.* at 144, 241 (appointing the same men as prothonotary of common pleas as well as clerk of quarter sessions for Washington and Pickering Counties).

[44] It is interesting to note that justices in the Mississippi territory, sitting as quarter sessions, were thus acquiring general jurisdiction during the same period that the justices of the peace in Kentucky stopped acting in that capacity. ROBERT M. IRELAND, THE COUNTY COURTS IN ANTEBELLUM KENTUCKY 2 (1972).

[45] LOWRY & MCCARDLE, *supra* note 14, at 197.

even condemned it as a public nuisance;[46] consequently, its powers were cut back to collecting city fines (not exceeding fifty dollars), and cases pending under its older, broader jurisdiction were transferred back to the county court in Adams County.[47]

Jurisdiction of the superior territorial courts was further complicated when in 1804 Congress appointed an additional judge with territorial jurisdiction over the Washington District—thus, divesting the existing superior judges of original jurisdiction[48] and giving the superior court appellate jurisdiction over the new judge.[49] In 1810 Congress added a fifth territorial judge for the Madison District under similar terms.[50] Although the territorial judges also sat as federal courts, the exact basis of their federal authority was never completely resolved.[51] By act of Congress in 1805, the territorial courts were given the same broad federal jurisdiction exercised by the district court in Kentucky.[52] By the same act, the Supreme

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[46] *Id.*

[47] Act of Mar. 10, 1803, §§ 4, 5, *revised and amended by* Act of Dec. 9, 1809, *in* STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 21, at 349.

[48] Act of Mar. 27, 1804, § 1, *in id.*, at 45. The Washington District surrounded the Tombigbee settlement. The judicial districts originally included in the western district of the territory were Adams (for Adams and Wilkinson counties) and Jefferson (for Jefferson and Claiborne counties).

[49] *Id.* §§ 1, 2. *See also* Act of Feb. 10, 1807, *in id.* at 138.

[50] Act of Mar. 2, 1810, § 2, *in* STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 21, at 48. The statute now expressly provided that the territorial court of Adams County had to sit in panels of at least two judges when hearing appeals from the territorial courts in Washington and Madison counties. *Id.* § 3, at 49. The Madison District was not present day Madison County, Mississippi, but lay to the east on the bend of the Tennessee River. *See* HAMILTON, *supra* note 33, at 72 n.31.

[51] Hamilton discusses the problem of federal authority of the territorial judges at length. HAMILTON, *supra* note 33, at 91-115. Territorial judges, like Judge Rodney, clearly believed that they could exercise jurisdiction of inferior federal courts. *See id.* at 93-95. Under Judge Rodney the territorial court issued process as a federal court and sat as a trial court in federal cases styling itself the "Supreme Court sitting as a circuit court of the United States." *Id.* at 95. This posed a legal problem in that the territorial supreme court lacked original jurisdiction and sat without a jury under territorial law. *Id.* at 95-96.

[52] Act of Mar. 3, 1805, *in* STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 21, at 46. The district court in Kentucky enjoyed all the jurisdiction of the circuit courts except the power to hear appeals or issue writs of error. *See* Act of September 24, 1789, *in id.*,at 46-47.

Court was given appellate jurisdiction over territorial courts, but no cases were appealed from the Mississippi Territory.[53]

Federal law that created the Mississippi Territory specifically imposed only the common law on the territory and granted the territorial judges "common law jurisdiction." Historians have suggested that Congress deliberately meant to omit equity jurisdiction.[54] Nevertheless, the territorial assembly bestowed equity jurisdiction on the superior territorial courts in 1802.[55] This equity jurisdiction was reconfirmed in 1807.[56] Thus, at an early date, Mississippi inherited the problematic distinction between law and equity, and as early as 1805, a party was arguing that an action should be dismissed because of an error

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[53] Act of September 24, 1789, *in* STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 21, at 46-47. The Supreme Court had previously distinguished the territorial courts from United States Circuit Courts and refused to exercise appellate jurisdiction over a territorial court because Congress had not expressly conferred such appellate jurisdiction on it. Clarke v. Bazadone, 5 U.S. (1 Cranch) 212, 214 (1803). *See generally* HAMILTON, *supra* note 33, at 100-02. Hamilton suggests some reasons for the absence of any appeals during the territorial period, and he concludes, "[s]o far as the private wrongs of the Mississippi colonists were concerned, their local courts were the last resort. The only checks upon such courts were the alertness of the bar and the habitual procedures of English common law." *Id.* at 105.

[54] "The term 'common law' was ambiguous. Probably—but by no means certainly—the term was meant to exclude equity jurisdiction." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 158 n.1 (2d ed. 1985). I believe this argument was first made by Francis S. Philbrick. FRANCIS S. PHILBRICK, THE LAWS OF THE INDIANA TERRITORY 1801-09, at xli nn.100-01 (1950).

[55] Act for giving Equity Jurisdiction to the Superior Courts, Jan. 30, 1802, *in* HAMILTON, *supra* note 33, at 131 n.56. Hamilton recounts the colorful local events leading up to this legislation. *Id.* at 129-30. Other territories also quickly authorized their courts to exercise equity jurisdiction or, in the case of the Indiana Territory, to create a separate court of equity. *Id.* at 129.

The influence of Blackstone and other legal texts led to the adoption of many ridiculous details that characterized equity practice in England. *See, e.g.*, *id.* at 131.

[56] Act of Feb. 10, 1807, § 45, *in* STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 21, at 142 (stating that "[e]ach of the territorial judges shall have power and authority to issue writs of injunction and *ne exeat*"); *id.* § 46 (stating that "courts sitting in chancery, shall have power and authority to order and issue all process, as hath usually belonged to courts of chancery"); *see also id.* § 43 (granting supreme court, as well as superior court for Washington district, equity jurisdiction over Washington district, as well as several other counties).

as between law and equity.[57]

Territorial legislation in 1807 reorganized the inferior and superior courts,[58] authorizing the governor to appoint five justices of the peace in each county. These justices (in panels of three) held the county court and the orphans' court,[59] with jurisdiction to probate wills, administer estates, record land

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[57] Judge Rodney's notes for the case of William Conner & Wife v. J[ames] W[illiams] records the argument, "the defendt. admits part of this acct. but denies that Pltffs remedy is in this Court, and Says it is in a Court of Law." HAMILTON, *supra* note 33, at 193 (discussing case brought during October Term of 1805). In a note at the end of the record, Judge Rodney wrote:

> In arguing the preceding Case the followg. Rules Or Legal Maxims were generally agreed To . . .
>
> The Courts of Equity are bound by Law as Well as the Court of Law.
>
> The Court of Chancery has Control over Exrs: Admrs: and Guardians Accounts &c. And have Control in the appointments of Guardians to Minors and Lunatics and Over the Management of their Estates and those of Orphans &c. and Sometimes may Take Cognizance of Partnership Accounts . . . .

Id. at 198.

[58] Rowland's account is confusing because he does not understand that the superior courts (in their various names) were nothing other than the territorial judges sitting in slightly different capacities. For example, the territorial judge who sat as trial judge in parts of the territory not yet made a county (and in the separate Washington district) was referred to (descriptively) as the district or district superior court, while the same judge sitting in counties was referred to (descriptively) as circuit court. The 1807 legislation did not actually establish new courts of these names as Rowland supposes, so much as it adjusted the jurisdiction of the existing superior courts and, in doing so, referred to them by their appropriate descriptive names. *See* ROWLAND, *supra* note 22, at 442. Thus territorial legislation granted each territorial judge broad power to issue "writs of error and process returnable to the supreme court, or either of the circuit courts, or to the district court of Washington, as the case may be." Act of Feb. 10, 1807, § 1, *in* STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 21, at 134. It was these same territorial judges, however, who sat as the "supreme court" (when in a panel exercising supervisory jurisdiction), as the "circuit court" (when sitting as a trial court), and as a "district court" (for the Washington district). *Id.* § 26, at 138. The territorial judges were also given broad supervisory or appellate jurisdiction over the inferior courts, which the statute variously called "inferior courts," "county" courts, and "justices of the peace." *Id.* § 1, at 134.

[59] Act of Feb. 10, 1807, § 1, *in* STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 21, at 131.

conveyances,[60] appoint guardians, and settle estates.[61] These county courts also continued to exercise broad, original civil and criminal jurisdiction as is evident from statutes regulating instruction to juries[62] and the entry and enforcement of judgments on verdicts.[63] The governor was authorized to commission the territorial judges to sit individually as criminal courts in their respective circuits or territories.[64] The statutes do not make clear what jurisdiction the local justices retained, but territorial legislation explicitly confirmed the broad, general jurisdiction of the circuit court:

> One or more of the said judges shall hold the said circuit courts for the counties aforesaid, respectively, and shall have full jurisdiction therein, of all actions and suits, real, personal and mixed, and causes, matters and things, arising under the constitution and laws of the United States, and ordinances and laws of this territory . . . and shall have all the power, authority and jurisdiction, in the said counties respectively, of justices of assize, nisi prius, oyer and terminer, and jail delivery.[65]

In 1809 the circuit courts previously established for six counties had their names changed to "superior courts of law and equity."[66] The supreme court's trial jurisdiction was given to these superior courts, and the supreme court was abolished.[67] The individual territorial judges sitting as "superior

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[60] *Id.* § 13, at 131-32.

[61] *Id.* § 15, at 132.

[62] *Id.* § 5, at 135. The Act precluded courts from charging juries on matters of fact but allowed judges to reiterate testimony and to instruct jurors on the law. *Id.*

[63] *Id.* § 41, at 141. The Act allowed courts to stay judgments to allow time to apply for a writ of error. *Id.* at 142.

[64] Act of Feb. 10, 1807, § 5, *in* STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 21, at 135; *see* Act of Feb. 6, 1807, § 12, *in id.* at 157 (authorizing special session of any superior court to try cases whenever necessary).

[65] Act of Feb. 7, 1807, § 9, *in* STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 21, at 135. The circuit courts also called the grand jury. *Id.* § 18, at 137-38.

[66] Act of Dec. 22, 1809, *in* STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 21, at 178-79.

[67] *Id.* § 6, at 179. *See generally* ROWLAND, *supra* note 22, at 442-43; HAMIL-

courts of law and equity" for particular counties thus directly exercised supervisory jurisdiction over the county justices. This arrangement was probably not entirely satisfactory, for in 1814 the territorial judges (sitting in panels of two) were designated "The Supreme Court of Errors and Appeals"[68]—with broad supervisory and appellate jurisdiction over the superior courts.[69] The Act divested county justices of some original ju-

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TON, *supra* note 33, at 72.

While writers often refer to this statute abolishing the "supreme court" as constituting a significant legal change in the court system, it probably had little practical effect. The supreme court did two things. First, it exercised original jurisdiction in parts of the territory not made counties. But as more of the territory was organized into counties, disputes fell increasingly under the jurisdiction of superior judges sitting as "circuit" rather than as "supreme court" judges. By act of Congress, a single judge could always have sat as the supreme court when so needed. But by requiring the judge to sit in the county as circuit court, the law minimized the serious inconvenience that parties and jurors would have suffered in traveling to the supreme court. Indeed, the inconvenience to jurors had been raised as a compelling argument in favor of giving federal jurisdiction to the circuit court rather than the supreme court. *See* Judge Rodney's note (June 8, 1807), *in id.* at 306 (stating that "[t]he others grounded Their Opinions on the Acts of the Terr[itor]y and Judge B[ruin] Said it was Too far Jurors to Come [to Adams] from Claiborn[e] here").

Second, the supreme court exercised supervisory jurisdiction—including jurisdiction over superior court judges. Thus, the main effect of abolishing the supreme court per se would apparently have been the elimination of the practice of superior judges in reviewing writs of error in panels of more than one judge. If, however, the judge to whom the error ran did not participate on the panel during such review, and if there were usually only two territorial judges in the western district, then there would not have been any change: ultimate review (before and after the abolition of the supreme court) occurred before a single territorial judge (who had not tried the case below).

[68] Act of Jan. 20, 1814, *in* STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 21, at 200. The court met at the court house in Adams county twice yearly, and the territorial judge for Washington district was excused from sitting in it. *Id.*

[69] *Id.* § 4, at 201. While establishing broad supervisory jurisdiction, this statute also significantly imposed the final judgment rule except where the trial judge certified the question:

> [B]ut no cause shall be removed into the said supreme court of errors and appeals, until after final judgement in the court below, except where the judge or judges in the said court below shall doubt as to the law, or rule of decision, and in that case, he or they may respite the final judgment, and refer the question to the said supreme court of errors and appeals. . . .

risdiction of law and gave superior courts of law and equity exclusive jurisdiction over matters where the amount in controversy exceeded fifty dollars.[70]

By the time Mississippi would be admitted as a state, there was a fully developed, multi-level court system in the territory. Modified from the organization of the court system inherited from the Northwest Territory, the western Mississippi Territory established a system of parallel trial courts: inferior county courts of local justices sat with original criminal jurisdiction and limited civil jurisdiction; and superior territorial courts sat as trial courts with general jurisdiction with broad supervisory or appellate jurisdiction over county justices. The same territorial judges, sitting in panels, exercised ultimate or supreme appellate court jurisdiction over the inferior and superior courts.[71] Even before statehood, the people in the territory had experienced a variety of courts of special jurisdiction—probate courts, orphans' courts, and courts martial.

II. COURTS UNDER THE CONSTITUTION OF 1817

Mississippi's first state constitution[72] divided state government into three branches, vesting the legislature with im-

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Id.

[70] *Id.* § 2, at 200-01.

[71] *See* Act of Dec. 12, 1816, *in id.* at 473.

[72] MISS. CONST. of 1817.

George Poindexter, who had served as territorial judge, chaired the committee that drafted the constitution and was responsible for much of its language. *See generally* MACK SWEARINGEN, THE EARLY LIFE OF GEORGE POINDEXTER: A STORY OF THE FIRST SOUTHWEST 146, 155 (1934); David G. Sansing, *Mississippi's Four Constitutions*, 56 MISS. L.J. 3, 5 (1988); Winbourne Magruder Drake, *The Framing of Mississippi's First Constitution*, 28 J. MISS. HIST. 301-27 (1967). The journal of the constitutional convention is reproduced in *The Journal of the Constitutional Convention of 1817*, 29 J. MISS. HIST. 443-504 (1967) (William F. Winter ed.). Although Drake and others have suggested that the structure of the court system reflected compromises that expressed dissatisfaction with the territorial courts, *see* Drake, *supra*, at 318-19, John W. Winkle III emphasizes the influence of other state models. "Adapted, if not borrowed verbatim, from other frontier constitutions such as those of Kentucky and Tennessee, the Mississippi version offered few, if any, distinctive features among its six articles." JOHN W. WINKLE III, THE MISSISSIPPI STATE CONSTITUTION A REFERENCE GUIDE 2 (1993).

peachment power[73] and authority to expel members[74] and punish persons for contempt.[75] It gave the legislature, rather than the governor, the authority to establish and regulate courts martial in the militia.[76]

The constitution preserved the territorial practice under which the legislature created and organized the court system. Under this new system, the legislature elected all judges, except justices of the peace.[77] The constitution itself established only the supreme court and gave the legislature the job of establishing other "superior and inferior courts of law and equity."[78] But the constitution's drafters obviously assumed that

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[73] MISS. CONST. of 1817, Impeachments, § 1 (giving House of Representatives sole responsibility to commence impeachments); *id.* § 2 (providing that Senate try impeachments with convictions based on minimum of two-thirds vote).

The impeachment article was taken verbatim from language in the Constitution of the State of South Carolina of 1790, except that South Carolina had required the House to impeach by a two-thirds vote and had listed the lieutenant governor after the governor in section three. S.C. CONST. OF 1790, art. V, *in* 2 THE FIRST LAWS OF THE STATE OF SOUTH CAROLINA app. at 41 (1981).

[74] The constitution provided that:

> Each house may . . . punish members for disorderly behaviour, and with the consent of two-thirds, expel a member; but not a second time for the same cause; and shall have all other powers necessary for a branch of the Legislature of a free and independent State.

MISS. CONST. of 1817, art. III, § 16.

[75] *Id.* § 20 ("Each house may punish by imprisonment, during the session, any person, not a member, for disrespectful or disorderly behavior in its presence, or for obstructing any of its proceedings: *Provided*, such imprisonment shall not at any one time exceed forty-eight hours.").

[76] *Id.*, Militia, § 1 ("The General Assembly shall provide by law for organizing and disciplining the militia of this state . . . .").

[77] *See id.* § 17 ("The appointment of all officers, not otherwise directed by this constitution, shall be by the joint vote of both houses of the General Assembly . . . ."). The only judicial appointment power given expressly to the governor was power to appoint a superior court judge for Jackson, Greene, Wayne, and Hancock counties. *See id.*, Schedule, § 9. The constitution gave the legislature power to determine the method for selecting justices of the peace, *id.* art. V, § 8, and the legislature gave the governor the power to appoint. Act concerning the Appointment, Jurisdiction, and Powers of Justices of the Peace, within This State § 1, June 1822 Miss. Laws 1, REVISED CODE OF THE LAWS OF MISSISSIPPI 19 (George Poindexter comp. 1824) [hereinafter REV. CODE MISS. 1824].

[78] "The judicial power of this state shall be vested in one Supreme Court, and such superior and inferior courts of law and equity as the legislature may, from

supreme court judges would serve individually as superior court judges, as had been the practice under the territory. The constitution specified that between four and eight superior court judges be appointed.[79] (The even number authorized for the superior bench makes sense in light of the constitutional prohibition against a judge sitting in a panel reviewing his own decision.[80]) All state judges, except justices of the peace, served during good behavior[81] but only to the age of sixty-five when they were barred from continuing to serve as judges.[82]

The constitution provided that the state be divided into judicial districts (containing three to six counties). A superior court judge was to be appointed and reside in each district.[83]

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time to time, direct and establish." MISS. CONST. of 1817, art. V, § 1. While some scholars assume this delegation of court-making was derived from the United States Constitution, *see* Winkle, *supra* note 73, at 4, the real model was the role of the territorial assembly in the immediately preceding period. Moreover, the language was not borrowed from the Constitution but was taken directly from the 1790 South Carolina state constitution or from some other constitution that copied it or that it copied. *See* S.C. CONST. of 1790, art. III, § 1, *in* THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA, *reprinted in* 2 THE FIRST LAWS OF THE STATE OF SOUTH CAROLINA, *supra* note 73, app. at 40 ("The judicial power shall be vested in such superior and inferior courts of law and equity as the legislature shall from time to time direct and establish.").

[79] MISS. CONST. of 1817, art. V, § 2. Rowland describes the election of the first supreme court judges. ROWLAND, *supra* note 22, at 445. One judge was elected for each of the four districts, and the judge residing in the second district was designated presiding judge. *Id.*

[80] MISS. CONST. of 1817, art. V, § 2.

[81] *Id.* § 9 ("The judges of the several courts of this State shall hold their offices during good behavior."). Justices of the peace, in contrast, would serve for a term directed by the legislature. *Id.* § 8. All judges could be impeached, and the governor could remove them for cause under procedures set forth in the constitution. *Id.* § 9. They could not simply be removed without cause by vote of the legislature, as one commentator suggests, *see* WINKLE, *supra* note 72, at 4, and the constitutional convention resisted efforts to permit removal by mere majority vote of the legislature. *See* Drake, *supra* note 72, at 320. The compensation of superior court justices could not be reduced while they were in office. MISS. CONST. of 1817, art. V, § 2.

[82] MISS. CONST. of 1817, art. V, § 10 ("No person who shall have arrived at the age of sixty-five years, shall be appointed to, or continue in the office of judge in this State.").

[83] *Id.* art. V, § 3, Although the constitution did not explicitly state that such a judge needed to be a superior court judge, a fair reading suggests this requirement.

Such superior courts were given original criminal jurisdiction; they were also given original civil jurisdiction, but "only where the matter or sum in controversy exceeds fifty dollars."[84] (Justices of the peace were permitted jurisdiction over civil matters up to fifty dollars.[85]) The superior court was required to sit at least twice a year in each county—though the superior judge for a district encompassing a particular county did not have to sit, and judges could hold court for each other.[86]

The drafters of the constitution already anticipated details of the judicial structure that they expected the legislature to establish. In addition to the general authority given the legislature to establish superior and inferior courts, the constitution specifically gave the legislature power to establish "a Court or Courts of Chancery, with exclusive original equity jurisdiction"[87] and power to establish probate courts in each county.[88]

Supreme court. The legislature established—or, perhaps more accurately, legislatively confirmed the constitutional establishment of—the supreme court.[89] Legislation directed the

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[84] The constitution employed language that explicitly granted original criminal jurisdiction to the superior court judges: "The Superior Court shall have original jurisdiction in all matters, civil and criminal, within this State." *Id.* § 4. I am thus baffled by Rowland's observation that "[u]nder the constitution of 1817, only one criminal court was in operation, that established at Natchez in 1823." ROWLAND, *supra* note 22, at 444.

[85] MISS. CONST. of 1817, art. V, § 8 ("[J]urisdiction in civil cases shall be limited to causes in which the amount in controversy shall not exceed fifty dollars. . . ."). As this was stated as a limitation on possible jurisdiction rather than as a grant of jurisdiction, the general laws could constitutionally further restrict the civil jurisdiction of justices of the peace. *See infra* text at notes 128, 140 (discussing respective civil jurisdiction of county court).

[86] MISS. CONST. of 1817, art. V, § 5. One commentator apparently misread this provision as applying to the supreme court thereby requiring the supreme court to sit twice a year. *See* Frank E. Everett, Jr., *Lawyers, Courts, and Judges 1890-1970, in* 2 A HISTORY OF MISSISSIPPI 378 (Richard A. McLemore ed. 1973).

[87] MISS. CONST. of 1817, art. V, § 6. The constitution vested equity jurisdiction in the superior courts until the establishment of the chancery court or courts. *Id.*

[88] *Id.* § 7 ("The Legislature shall have power to establish in each county within this State a Court of Probate, for the granting of letters testamentary and of administration, for orphans' business, for county police, and for the trial of slaves.").

[89] Act to Establish and Organize the Supreme Court and to Define the Powers

court to sit in Natchez and gave it appellate jurisdiction over the circuit courts, chancery court, and probate courts:

> The said Supreme Court shall have jurisdiction over and shall hear and determine all manner of pleas, plaints, motions, causes and controversies, civil and criminal. . .which may be brought before it, from any Circuit Court of Law, Superior Court of Chancery, or Orphans'; Court of any County in this State, either by appeal, writ of error, or *supersedeas*, or other legal means . . . .[90]

At the same time, legislation cut back the wide ranging supervisory jurisdiction exercised by the territorial supreme court, specifically limiting appellate jurisdiction to the review of final decisions except as otherwise provided by statute.[91] Legislation gave the supreme court authority to promulgate court rules for itself and for the circuit courts but not for chancery court.[92] The supreme court had no general original jurisdic-

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and Jurisdiction Thereof §§ 1-5, June 1822 Miss. Laws 76-77, REV. CODE MISS. 1824, *supra* note 77, § 1.

[90] REV. CODE MISS. 1824, *supra* note 77, § 5, at 149-50. The supreme court's seat was moved to Lawrence county from 1826 to 1827. *See* Act to Remove the Supreme Court of This State from the City of Natchez [Jan. 31, 1826] § 1, *in* LAWS OF THE STATE OF MISSISSIPPI; EMBRACING ALL ACTS OF A PUBLIC NATURE FROM JANUARY SESSION, 1824, TO JANUARY SESSION 1838, INCLUSIVE 95 (1838) [hereinafter LAWS MISS. 1824-38] (moving court to town of Monticello); Act to Provide for Holding one Term of the Supreme Court at Natchez § 1, 1828 Miss. Laws 60, LAWS MISS. 1824-38, *supra*, at 146-47 (providing for winter term of supreme court to be held in Natchez).

Writs of error were made available as a matter of right by statute in 1830. Act to Amend the 54th Section of an Act Entitled "An Act to Establish a Court of Chancery in this State . . . " § 4, Jan. 1830 Miss. Laws 33, LAWS MISS. 1824-38, *supra* at 217.

[91] REV. CODE MISS. 1824, *supra* note 77, at 150 ("*Provided*, That no appeal, writ of error or *supersedeas* shall be granted, nor shall any cause be removed into the Supreme Court, in any manner whatsoever, until after final judgement or decree in the court below, except in cases particularly provided for by law."). There were a number of exceptions, the most important being interlocutory appeals in chancery. *Id.* at 151; *see infra* note 117.

The supreme court strictly enforced the limits of its own jurisdiction, requiring that there be an express grant of jurisdictional authority, and refusing to exercise jurisdiction to review an interlocutory decree in chancery that ordered an accounting but did not yet order the payment of any money. *See* Linn v. Kyle, 1 Miss. (1 Walker) 315, 316 (1829).

[92] *See* Act to Amend an Act Entitled "Act to Establish and Organize the Su-

tion,[93] but it acquired authority to try a few types of cases through specific legislation.[94]

Circuit Courts. The legislature acted—as the constitution had implicitly assumed they would—to make each judge of the supreme court the circuit judge for the multi-county circuit in which he resided.[95] The legislature initially designated four circuits[96] and granted circuit courts broad original common-law jurisdiction. Though circuit jurisdiction was limited to "law" and to controversies of fifty or more dollars, the statute also vested in the court jurisdiction over every case *not* given to some other court:

> The circuit courts of law in the several counties of this state, shall have original jurisdiction of all suits and actions for the

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preme Court and to Define the Powers and Jurisdiction Thereof" § 1, Feb. 8, 1827, LAWS MISS. 107 (1824-38) ("It shall be the duty of the supreme court of this state to establish rules for proceeding in said court, and also rules for bringing causes to issue and the proper conducting of the business in the several circuit courts . . . . "); Act to Provide for Reporting the Decisions of the Court of Chancery and for Other Purposes § 1, Jan. 1830 Miss. Laws 49, LAWS MISS. 1824-38, *supra* note 90, at 223 (authorizing Chancellor Quitman "to adopt a system of rules of practice in the court of chancery").

[93] In holding that a statute authorizing transfer of a case before final judgment from a superior court conferred jurisdiction and did not exceed the constitutional limits of the supreme court's powers, the court emphasized that the superior court (with original jurisdiction) itself authorized the transfer under the statute. Blanchard's Adm'r v. Buckholt's Adm'r, 1 Miss. (1 Walker) 64, 65 (1818).

[94] When the chancellor was disqualified from hearing a case under his jurisdiction, the case was removed to the supreme court. Act to Establish a Court of Chancery § 7, 1822 [Nov. 1821] Miss. Laws 107, REV. CODE MISS. 1824, *supra* note 77, at 86. The supreme court, along with circuit and chancery courts, was authorized to hear petitions for writs of habeas corpus. Act to Reduce into One the Several Acts Concerning the Writ of Habeas Corpus and to Annul the Remedy by Writ *De Hominem Replegiando* § 1, June 1822 Miss. Laws 266-67, REV. CODE MISS. 1824, *supra* note 77, at 221.

[95] Act to Reduce into One the Several Acts and Parts of Acts Concerning the Establishment, Jurisdiction and Powers of the Superior Courts of Law § 4, June 1822 Miss. Laws 26, REV. CODE MISS. 1824, *supra* note 77, at 102. Judges were allowed to swap circuits—permanently or temporarily. *Id.* § 174, June 1822 Miss. Laws 72-73, REV. CODE MISS. 1824, *supra* note 77, at 145.

[96] A fifth circuit would be added in 1828. Act to Amend an Act to Reduce into One the Several Acts and Parts of Acts Concerning the Establishment, Jurisdiction and Powers of the Superior Courts of Law § 1, 1828 Miss. Laws 72, LAWS MISS. 1824-38, *supra* note 90, at 148-49.

> recovery of money, founded on any bond, bill, promissory note, or other written contract, covenant or agreement whatsoever, or on any open account where the matter in controversy shall be of the value of fifty dollars or upwards, and of all other civil suits and actions, real, personal and mixed, and all causes, matters and things arising under the constitution and laws of this state, not expressly cognizable in some other court, established by law; and shall have power to hear and determine all prosecutions in the name of the state . . . except such as may be exclusively cognizable before a justice of the peace, or in some other court of this state, or of the United States . . . . And the judges of said courts . . . shall have authority to grant writs of *habeas corpus*, *mandamus*, *certiorari*, writs of *error*, and *supersedeas*, and all other remedial writs . . . [97]

The court construed the amount in controversy strictly, so a claim on a fifty dollar note that did not demand interest did not survive a demurrer.[98] The Act gave circuit courts broad power to remove cases pending in county courts.[99] Even though the legislature called circuit courts superior courts of "law," and even though (as envisaged by the constitution) it created a court of chancery, the legislature attempted to give circuit judges power to grant injunctions and writs of *ne exeat*.[100]

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[97] Act to Reduce into One the Several Acts and Parts of Acts Concerning the Establishment, Jurisdiction and Powers of the Superior Courts of Law § 16, June 1822 Miss. Laws 30, REV. CODE MISS. 1824, *supra* note 77, at 105-06.

[98] Thomas v. Miller, 1 Miss. (Walker) 324, 324 (1829).

[99] *See* Act to Reduce into One the Several Acts and Parts of Acts Concerning the Establishment, Jurisdiction and Powers of the Superior Courts of Law §§ 168-69, June 1822 Miss. Laws 71-72, REV. CODE MISS. 1824, *supra* note 77, at 144.

[100] *Id.* § 176, June 1822 Miss. Laws 73, REV. CODE MISS. 1824, *supra* note 77, § 145 ("The judges . . . shall within their respective circuits, have power to grant writs of injunction . . . ."). Perhaps injunctions were termed "writs of injunction" in order to bring them under the constitution's grant of jurisdiction over all remedial "writs."

In 1828, circuit courts were also authorized to engage in the equitable practice of compelling discovery. Act to Authorize and Compel Discoveries in Courts of Law in Certain Cases § 1, 1828 Miss. Laws, LAWS MISS. 1824-38, *supra* note 90, at 162 ("[C]ircuits [sic] courts of law therein shall be . . . vested with full and complete power to compel discoveries in aid of actions at law . . . whenever, by the rules of equity, a discovery would be compelled in a court of chancery . . . .").

This jurisdiction to issue injunctions is the distant ancestor of the present statute that gives (or attempts to give) circuit courts authority to issue injunctive relief.[101] Because the legislature in 1821 had already given exclusive equity jurisdiction to the chancery court, and because the statute defining circuit court jurisdiction granted the circuit court general original jurisdiction "*not expressly cognizable in some other court*," it was problematic how equity jurisdiction might be conferred on circuit courts.[102]

Since potential equity jurisdiction of circuit courts remains a live issue, it is worth asking exactly what the General Assembly meant to do in 1822 when it first attempted to give the circuit court power to grant injunctions. There are several possible interpretations. First, the legislation may have been a blunder—the legislature may not have meant to affect the jurisdiction of courts at all—in which case the grant of power to issue an injunction might have been invalid.[103] Second, since the consolidation of legislation (including circuit court power to

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[101] MISS CODE ANN. § 9-1-19 (Supp. 1995) ("The judges of the . . . circuit courts . . . may severally . . . grant injunctions and all other remedial writs. . . ."). The present statute first appeared in the code of 1857. MISS. REV. CODE ch. 61, § 3, art. 9 (1857). The supreme court has remarked (in dictum) that this statute authorizes circuit court judges to grant injunctions. McMahon v. Adult Membership Bds. of the Phi Kappa, Duty, and Debs Clubs, 146 So. 2d 359, 360 (Miss. 1962). It seems, however, that no party has challenged the constitutionality of the statute, nor has anyone ever directed the court's attention to the fact that the present statute stems from 1857, a time when circuit courts were granted equity jurisdiction by the constitution and, indeed, when separate chancery courts had been abolished. *See infra* text accompanying notes 235 to 244.

[102] It should be noted, however, that there was originally no constitutional problem with the grant of jurisdiction to issue injunctions to circuit court, because the constitution did not divest the circuit court of jurisdiction conferred on other courts. *But see infra* text accompanying notes 393-394 (discussing constitution of 1890). The only jurisdiction divested from the circuit courts under the constitution of 1817 was civil jurisdiction over matters where the matter or sum in controversy did not exceed fifty dollars. MISS. CONST. of 1817, art. V, § 4.

[103] There are also problems with the grant of jurisdiction to issue writs of *ne exeat*. The writ of *ne exeat* prohibited a person from leaving the court's jurisdiction. Such writs, so far as they restricted citizens from leaving the state, may have been unconstitutional. *See* MISS. CONST. of 1817, art. 1, § 27 ("No citizen of this State shall be exiled, or prevented from emigrating, on any pretence whatever.").

grant injunctions) came after the creation of chancery court jurisdiction, the legislative grant of authority to issue injunctions may have been intended to—or have had the effect of—giving circuit court and chancery court an area of concurrent jurisdiction. Third, the circuit courts may have acquired only an extremely limited authority to grant injunctions and writs of *ne exeat* until the dispute could be presented to the chancellor.

This third interpretation is supported by the consideration that there was only one chancellor for the entire state; thus cases requiring provisional injunctive relief would have been left without any remedy at all when they arose some distance from the chancellor. Language in the statute supports this third interpretation, for the legislature specified that such writs be "returnable to the court of chancery, where the same is cognizable . . . ."[104] The reference to "writs of" injunction may also suggest that the legislature envisaged the process initiating such relief as analogous to the common-law writs: such an injunction presumably operated like either a peremptory writ—that is, it would order a party to do (or not to do something), but the party could subsequently appear and challenge the order. In effect, this gave circuit courts power to grant relief comparable to a temporary restraining order, but the requirement that process be returnable in chancery assured that the case would proceed in a court of equity. This equitable power given to circuit courts may have been required by the exigencies of a day when one chancellor could not possibly respond to the need for urgent relief at the local level; and in the absence of an adequate remedy at equity, the common-law court was given the power to issue the writ and grant provisional equitable relief—resulting in a reversal of the roles of chancellor and common law judge in England. It is doubtful, however, whether circuit courts granted many such provisional injunctions.[105]

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[104] Act to Reduce into One the Several Acts and Parts of Acts Concerning the Establishment, Jurisdiction and Powers of the Superior Courts of Law § 176, June 1822 Miss. Laws 73, REV. CODE MISS. 1824, *supra* note 77, at 145.

[105] My reason for doubting this is that the legislature in 1825 would prohibit

Court of Chancery. The legislature established a superior court of chancery consisting of one Chancellor[106] with "exclusive jurisdiction over all matters, pleas and plaints, whatsoever, belonging to or cognizable, in a court of equity"[107] so long as the amount in controversy was not less than fifty dollars.[108] Though the chancellor's equity jurisdiction required the absence of an adequate remedy at law,[109] the chancellor could nevertheless assume jurisdiction over legal claims in a

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both the chancellor and the supreme court from issuing injunctions ex parte. Act Supplemental to an Act to Establish a Court of Chancery in this State, and to Prescribe the Rule of Proceeding Therein § 1, Feb. 4, 1825, LAWS MISS. 1824-38, *supra* note 90, at 4 (stating that no injunction or stay or supersedeas shall be granted unless defendant had five days notice). It seems extremely unlikely that the legislature meant to permit the circuit courts to issue injunctions prohibited to the chancellor and supreme court, and the most likely reasons for the omission of the circuit court was that lawmakers forgot (then as now) that there was a grant of injunction power to the circuit court.

[106] Act to Establish a Court of Chancery in this State and to Prescribe the Rules of Proceeding Therein § 1, 1822 [Nov. 1821] Miss. Laws 105, REV. CODE MISS. 1824, *supra* note 77, at 84. Legislation created two districts and required the chancellor to sit at specified terms in Adams county for the western district and in Marion for the eastern district. Act to Establish a Court of Chancery § 4, 1822 [Nov. 1821] Miss. Laws 106, REV. CODE MISS. 1824, *supra* note 77, at 85. In 1827, the state was divided into four chancery districts. Act to Amend an Act Entitled "Act to Establish a Court of Chancery" § 1 [Feb. 5, 1827], LAWS MISS. 1824-39, *supra* note 90, at 131.

[107] Act to Establish a Court of Chancery § 2, 1822 [Nov. 1821] Miss. Laws 105, REV. CODE MISS. 1824, *supra* note 77, at 84.

[108] "But no person shall commence an original suit in any matter of less value than fifty dollars, on pain of having the same dismissed with costs." *Id.* § 21, 1822 [Nov. 1821]. Miss. Laws 111, REV. CODE MISS. 1824, *supra* note 77, at 90.

[109] *See, e.g.*, Ross v. Barland, 1 Miss. (1 Walker) 489, 491 (1831) (holding no equity jurisdiction to vacate land grant where court of law could set aside grant); Bates v. Bates, 1 Miss. (1 Walker) 356, 357 (1829) (holding that party claiming legal property in slaves could not invoke equity). *See generally* 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 434 (T. Cooley ed. 1884). Blackstone observed:

> The suggestion indeed of every bill, to give jurisdiction to the courts of equity (copied from those early times), is that the complainant hath no remedy at the common law. But he who should from thence conclude, that no case is judged of in equity where there might have been relief at law, and at the same time casts his eye on the extent and variety of the cases in our equity reports, must think the law a dead letter indeed.

Id.

number of ways.[110] The chancellor had considerable discretion in trying cases; if he did not dispose of them on the record of depositions[111] or evidence accumulated by commissioners,[112] he could sit as a trial court (without a jury),[113] and he could also set the matter for trial before any other court (which would likewise try the case without a jury).[114] The chancellor could certify legal questions to the supreme court for its opinion.[115] In addition, appeals of final decisions[116] and interlocutory appeals[117] lay to the supreme court.

Probate Courts. As envisaged by the constitution, the legislature created probate courts for every county called the orphans' court, consisting of one judge with broad power to probate wills, supervise estates, appoint guardians for minors and incompetents—"with full jurisdiction of all testamentary, and other matters pertaining to an Orphans' court or court of probate."[118] The probate judge could try cases without a jury,

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[110] In litigation to enjoin enforcement of a judgment, where the creditor went into great detail in the accounting, the supreme court held that the chancellor acquired jurisdiction over the account because it would be unfair to let the creditor raise the validity of certain claims and challenge jurisdiction only if he lost. Head v. Gervais, 1 Miss. (1 Walker) 431, 436-37 (1831).

[111] Act to Establish a Court of Chancery § 31, 1822 [Nov. 1821] Miss. Laws 113, REV. CODE MISS. 1824, *supra* note 77, at 90-92.

[112] The chancellor could appoint commissioners who enjoyed broad power to subpoena and examine witnesses. *Id.* §§ 25-29, 32, 1822 [Nov. 1821] Miss. Laws 112-13, REV. CODE MISS. 1824, *supra* note 77, at 90-92.

[113] *Id.* § 24, 1822 [Nov. 1821] Miss. Laws 112, REV. CODE MISS. 1824, *supra* note 77, at 90.

[114] *Id.* ("The chancellor, in his discretion may direct an issue or issues, to be tried . . . in any other court whatsoever, as justice or convenience to the parties may require; and in all other cases, the mode of trial shall be the same as has been heretofore used and practised in courts of chancery.").

[115] *Id.* § 30, 1822 [Nov. 1821] Miss. Laws 113, REV. CODE MISS. 1824, *supra* note 77, at 90.

[116] *Id.* § 35, 1822 [Nov. 1821] Miss. Laws 114, REV. CODE MISS. 1824, *supra* note 77, at 93.

[117] Act fo Establish a Court of Chancery §§ 34-37, 1822 [Nov. 1821] Miss. Laws 114-16, REV. CODE MISS. 1824, *supra* note 77, at 93-94.

[118] *Id.* Act to Reduce into One the Several Acts Concerning Last Wills and Testaments, the Duties of Executors, Administrators and Guardians, and the Rights of Orphans and Other Representatives of Deceased Persons § 1, 1822 [Nov. 1821] Miss. Laws 37-38, REV. CODE MISS. 1824, *supra* note 77, at 27. The probate court had no power to issue a writ of certiorari to a justice of peace.

and under equity-type proceedings could receive depositions and sworn statements.[119] In the event of a factual dispute, parties could demand that the contested issues be sent to the circuit court for trial—before a jury when appropriate.[120] Appeals originally lay in all cases from the orphans' court either to the chancery court or the supreme court.[121] In 1824 the probate courts were amalgamated to the county courts; the probate judge was required to sit in a panel with at least one other county justice;[122] and there were no appeals from the amalgamated courts to the supreme court.[123] But in 1830 appeals were again authorized either to the chancery or the supreme court.[124]

County Courts. The legislature also established county courts for each county. In a significant change from territorial practice, such courts were made entirely separate from the justices of the peace.[125] The county court was composed of the

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Barlow v. Esterling, 1 Miss. (1 Walker) 302, 302 (1827).

[119] § 8, 1822 [Nov. 1821] Miss. Laws 40, REV. CODE MISS. 1824, *supra* note 77, at 29.

[120] *Id.* The Act provided:

> [I]n case either party shall require, the court shall direct an issue or issues to be made up, and sent to the circuit court of the same county; and the said issue or issues shall be tried in the said circuit court as soon as may be . . . and the power of the said court, and proceedings relative thereto, shall be, as in other cases, respecting the trial of issues; and the orphans' court shall give judgment, or decree upon the bill and answer, or upon bill, answer, depositions, or finding of the jury . . . .

Id.

[121] *Id.* § 12, 1822 [Nov. 1821] Miss. Laws 41, REV. CODE MISS. 1824, *supra* note 77, at 30. Apparently the choice of the appellate court was left to the appellant. This right was retained in An Act to Amend an Act entitled "Act to Establish a Court of Probate" § 1, Jan. 1830 Miss. Laws 27, LAWS MISS. 1824-38, *supra* note 90, at 295.

[122] Act to Establish a Court of Probate § 1 [Jan. 23, 1824], LAWS MISS. 1824-39, *supra* note 90, at 3.

[123] *In re* Sellers, 1 Miss. (1 Walker) 414, 414 (1831) (dismissing two appeals from county and probate courts, citing Act of 1824, emphasizing supreme court's limited jurisdiction).

[124] Act to Amend an Act Entitled "Act to Establish a Court of Probate" § 1, Jan. 1830 Miss. Laws 30, LAWS MISS. 1824-39, *supra* note 90, at 95.

[125] Legislation expressly provided that justices of county courts could not be justices of the peace. Act Concerning the Establishment, Jurisdiction and Powers

Probate Judge of the county who served as presiding justice and of two associate justices.[126] Though designated inferior courts of law, the justices were elected by the General Assembly and served for an indefinite term.[127] These courts exercised limited original jurisdiction over contract and quasi-contract disputes in which the sum demanded was more than twenty and not more than fifty dollars.[128] These monetary limits were jurisdictional, for the courts were required to dismiss ("nonsuit") actions brought for an amount greater or less than the limits; they were directed likewise to dismiss actions fraudulently alleging an amount greater than twenty dollars with the purpose of evading the act.[129] At the same time, the legislature evinced a more realistic approach to jurisdiction in allowing the county courts to enter judgments above the statutory amount if an affidavit were filed to the effect that the amount sought did not exceed fifty dollars when the action was commenced.[130] Appeals lay to the circuit court,[131] but concern with frivolous appeals led the legislature to impose ten percent "damages" (in addition to interest and costs) on defen-

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of the Inferior Courts of Law in the Several Counties of this State § 34, June 1822 Miss. Laws 21, REV. CODE MISS. 1824, *supra* note 77, at 81.

[126] *Id.* § 1, June 1822 Miss. Laws 21, REV. CODE MISS. 1824, *supra* note 77, at 71.

[127] *Id.* § 1-2, June 1822 Miss. Laws 11, REV. CODE MISS. 1824, *supra* note 77, at 71-72.

[128] *Id.* § 14, June 1822 Miss. Laws 15, REV. CODE MISS. 1824, *supra* note 77, at 75 ("The county courts . . . shall have original jurisdiction of all suits and actions for the recovery of money, founded on any bond, bill, promisory note, or other written contract, covenant or agreement whatsoever, or on any open account, where the sum demanded shall exceed twenty dollars, and shall not exceed fifty dollars, including all interest due thereon . . . ."). I read this monetary limit as applying to all the causes of action, but it would be possible to read it as applying only to actions on open accounts.

[129] *Id.* § 15, June 1822 Miss. Laws 15, REV. CODE MISS. 1824, *supra* note 77, at 75.

[130] Act Concerning the Establishment, Jurisdiction and Powers of the Inferior Courts of Law in the Several Counties of this State § 15, June 1822 Miss. Laws 15, REV. CODE MISS. 1824, *supra* note 77, at 75.

[131] *Id.* § 24, June 1822 Miss. Laws 18, REV. CODE MISS. 1824, *supra* note 77, at 78. Actions could not be appealed or removed by writ to the supreme court unless first taken to the circuit court. Id. § 26, June 1822 Miss. Laws 19, REV. CODE MISS. 1824, *supra* note 77, at 79.

dants who unsuccessfully appealed county court judgments to the circuit court, at least in Monroe County.[132]

County courts functioned as the "slave courts" with jurisdiction to enforce the brutal slave code and to try slaves for felonies.[133] The courts also served as primitive administrative agencies.[134]

Justices of the Peace. The legislature acted to regulate justices of the peace. At first, justices of the peace were recommended by the county court and appointed by the governor for three-year terms.[135] After 1830, however, they were elected.[136] The justices had power to issue warrants, set bail,

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[132] Act to Amend an Act Entitled "Act to Extend the Power and Jurisdiction of the County Court in and for the County of Monroe and for Other Purposes" § 1 [Jan. 10, 1824], LAWS MISS. 1824-39, *supra* note 90, at 20.

Monroe County court had a unique history. Given concurrent jurisdiction with circuit court up to the staggering amount of three hundred dollars, the court was divested of original civil jurisdiction altogether in 1825, and pending cases were transferred to circuit court. Act to Repeal an Act Entitled "Act to Extend the Jurisdiction and Power of the County Court in and for the County of Monroe, and for Other Purposes" §§ 1, 3 [Jan. 29, 1825], LAWS MISS. 1824-38, *supra* note 90, at 60. Other legislation ultimately removed all vestiges of the exceptional treatment of the county court in Monroe County. Act [of Jan 30, 1830] to Amend an Act Entitled "Act to Establish a Court of Probate" § 1, Jan. 1830 Miss. Laws 26, LAWS MISS. 1824-38, *supra* note 90, at 214-15; Act [of Feb. 11, 1830] to Amend and Act Entitled "Act to Establish a Court of Probate" § 1, Jan. 1830 Miss. Laws 172, LAWS MISS. 1824-38, *supra* note 90, at 293 (repeating repealer provision of Act of Jan. 30).

[133] Act Concerning the Establishment, Jurisdiction and Powers of the Inferior Courts of Law in the Several Counties of this State § 14, June 1822 Miss. Laws 14, REV. CODE MISS. 1824, *supra* note 77, at 75 ("The County Courts . . . shall have power to hear and determine all prosecutions in the name of the State, against any slave or slaves, charged with felony. . . . ").

[134] The judicial organization of county administration could result in unwieldy procedures. The county court was responsible for organizing the road system. However, legislation required the selection of a jury of property owners to arrange the details of the route. In one case a county neglected to empanel a jury. The procedural error was treated, however, as effecting of the jurisdiction of the county court. Stockett v. Nicholson 1 Miss. (1 Walker) 75, 77-79 (1818) (holding that county court, as inferior court, lacked jurisdiction in absence of jury to direct construction of road so that overseer was not allowed to raise county's order as defense to trespass).

[135] Act Concerning the Appointment, Jurisdiction and Powers of Justices of the Peace §§ 1-2, June 1822 Miss. Laws 1-2, REV. CODE MISS. 1824, *supra* note 77, at 19.

[136] Act Further to Amend the Acts Concerning the Jurisdiction and Powers of

conduct preliminary hearings, and hold suspects for trial before the circuit court.[137] In addition, they acquired jurisdiction to try many serious offenses involving free blacks and slaves[138] as well as jurisdiction over a hodgepodge of less serious offenses.[139]

Justices of the Peace in this State and for Other Purposes § 1, Dec. 1830 Miss. Laws 117-18, LAWS MISS. 1824-38, *supra* note 90, at 334.

This significant change in the method of selecting justices preceded the more dramatic changes in the constitution of 1832, which would require the election of all state judges. *See infra* text accompanying note 193.

[137] Act Concerning the Appointment, Jurisdiction and Powers of Justices of the Peace, §§ 3-5, June 1822 Miss. Laws 2-3, REV. CODE MISS. 1824, *supra* note 77, at 20-21.

[138] For example, it was a crime for either slaves or free blacks or mulattos to gather "for teaching them reading or writing, either in the day or night, under whatsoever pretext" and justices of the peace could try offenders and sentence them to up to thirty-nine lashes. Act to Alter and Amend an Act Entitled "Act to Reduce into One the Several Acts Concerning Slaves, Free Negroes and Mulattoes § 2 [Jan. 16, 1823], REV. CODE MISS. 1824, *supra* note 77, at 390. A justice of the peace could sentence a free black to up to thirty-nine lashes "well laid on his or her back" for giving liquor to a slave. Act to Reduce into One the Several Acts Concerning Slaves, Free Negroes, and Mulattoes § 31, June 1822 Miss. Laws 188, REV. CODE MISS. 1824, *supra* note 77, at 376. A justice of the peace could sentence a black or mulatto, free or slave, to up to thirty-nine lashes for using abusive and provoking language. Id. § 32, June 1822 Miss. Laws 190-91, REV. CODE MISS. 1824, *supra* note 77, at 376.

[139] The same conduct, such as keeping a dog, might constitute a serious offense for a slave, punished by up to twenty-five lashes for each offense, but a minor offense for a master, punished by a five dollar fine. Act to Reduce into One the Several Acts Concerning Slaves, Free Negroes, and Mulattoes § 42, June 1822 Miss. Laws 190-91, REV. CODE MISS. 1824, *supra* note 77, at 379. See also Act to Prevent Unlawful Hunting §§ 1, 3, June 1822 Miss. Laws 243-44, REV. CODE MISS. 1824, *supra* note 77, at 319 (giving justice of the peace power to try offenders for illegal hunting but authorizing thirty lashes for slaves and fines for others). When the punishment was serious enough, the justice of the peace lost jurisdiction over white defendants. For example, a slave attending an unlawful assembly was tried by the justice of the peace and punished with up to thirty-nine lashes. Act to Reduce into One the Several Acts Concerning Slaves, Free Negroes, and Mulattoes § 31, June 1822 Miss. Laws 188, REV. CODE MISS. 1824, *supra* note 77, at 376. A white person attending such a meeting would be bound over to the next superior court and could ultimately be fined twenty dollars and receive up to twenty lashes. Id. § 19, June 1822 Miss. Laws 184, REV. CODE MISS. 1824, *supra* note 77, at ____.

Justices of the peace were given jurisdiction to try violations of an Act for the Suppression of Vice and Punishing the Disturbers of Religious Worship and Sabbath Breakers § 8, June 1822 Miss. Laws 225, REV. CODE MISS. 1824, *supra*

Legislation granted civil jurisdiction to justices of the peace over a variety of contract and quasi-contract claims not exceeding fifty dollars.[140] Other acts gave justices of the peace concurrent jurisdiction with county court justices to issue writs of distraint[141] and (sitting as panels with juries) to try forcible entry and detainer actions.[142] In any suit tried before a justice of the peace, a party could appeal to the county court,[143] where the case would be tried de novo.[144] When a justice of the peace lacked jurisdiction and a party appealed the case from county court to circuit court, the circuit court could enter judgment for the defendant.[145] Otherwise, county court decisions on appeal were final, and no further appeals were permitted.[146]

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note 77, at 316-18 (providing for punishment of cursing, drunkenness, and other bad behavior by fines or imprisonment for up to 24 hours).

[140] Act Concerning the Appointment, Jurisdiction and Powers of Justices of the Peace § 9, June 1822 Miss. Laws 4, REV. CODE MISS. 1824, *supra* note 77, at 22. The Act provided that:

> All debts and demands not exceeding fifty dollars, for a sum or balance due on any specialty, note, bond, cotton receipt, contract or agreement in writing, or for goods, wares and merchandize [sic] sold and delivered, or for work or labor done, or for money lent, or for specific articles, or for any sum or balance due, either by writing or verbal contract, or assumpsit, in any case not sounding in damages merely, are hereby declared to be cognizable and determinable by a justice of the peace. . . . "

Id. The monetary limit and the desirability of quick, local justice meted out by justices of the peace motivated creditors to structure their claims so as to bring them before a justice of the peace. The supreme court held that creditors could not separately enforce three notes given in the same transaction in order to confer jurisdiction on a justice of the peace. Grayson v. Williams, 1 Miss. (1 Walker) 298, 298 (1827) (remarking that splitting of claims in order to bring cases before justices of peace "has been a vexed question in our courts, since the formation of our state government . . . .").

[141] Act for the Better Securing the Payment of Rents § 1, June 1822 Miss. Laws 260.

[142] Act Concerning Forcible Entries and Detainer § 10, June 1822 Miss. Laws 378, REV. CODE MISS. 1824, *supra* note 77, at 23.

[143] Act Concerning the Appointment, Jurisdiction and Powers of Justices of the Peace § 18, June 1822 Miss. Laws 7, REV. CODE MISS. 1824, *supra* note 77, at 25.

[144] *Id.*

[145] *Id.*

[146] Specifically, the Act provided that:

Though justices of the peace initially had no general powers to summon a jury, the statutes explicitly provided that the right to trial by jury be available upon appeal when the amount in controversy exceeded twenty dollars.[147] In addition, statutes directed justices of the peace to empanel a jury in executions where the ownership of property subject to attachment was disputed.[148]

After 1830 the legislature altered the practice of trial before justices of the peace. Legislation reinstated the original trial jurisdiction of justices of the peace over contract and quasi-contract disputes up to fifty dollars.[149] But appeals no longer went directly to circuit court; instead they were "tried before any one or more justice or justices of the company district in which the cause originated, by five jurors . . . whose verdict shall be final and conclusive, between the parties, (except removed by certiorari.)"[150] Certain property disputes were likewise tried before five jurors.[151] In 1831, justices were directed to sit in panels of two when holding court.[152]

> [N]or, shall any proceedings had before a justice of the peace, for the recovery of any debt or demand within the jurisdiction of such justice, be otherwise re-examined and reversed or affirmed, than by appeal to the county court of the county for which justice of the peace shall have been appointed . . . ."

Act Concerning the Establishment, Jurisdiction and Powers of Inferior Courts of Law § 26, June 1822 Miss. Laws 49, REV. CODE MISS. 1824, *supra* note 77, at 79.

[147] Act Concerning the Appointment, Jurisdiction and Powers of Justices of the Peace § 19, June 1822 Miss. Laws 8, REV. CODE MISS. 1824, *supra* note 77, at 25.

[148] *See* Act Directing the Method of Proceeding in Courts of Equity Against Absent Debtors and Other Absent Defendants and for Regulating the Proceedings on Attachments Against Absconding Debtors § 24, June 1822 Miss. Laws 97, REV. CODE MISS. 1824, *supra* note 77, at 167; Act to Amend the Several Acts Concerning the Appointment, Jurisdiction and Powers of Justices of the Peace § 4 [Jan. 25, 1826], LAWS MISS. 1824-38, *supra* note 90, at 100.

[149] Act Further to Amend the Acts Concerning the Jurisdiction and Powers of Justices of the Peace § 4, Dec. 1830, Miss. Laws 118, LAWS MISS. 1824-38, *supra* note 90, at 335.

[150] *Id.* § 5, Dec. 1830 Miss. Laws 118, LAWS MISS. 1824-38, *supra* note 90, 335.

[151] *Id.* § 6, Dec. 1830 Miss. Laws 119, LAWS MISS. 1824-38, *supra* note 90, 336.

[152] Act to Amend an Act Entitled "Act Further to Amend the Acts Concerning

Courts Martial. The General Assembly exercised the power granted it under the 1817 constitution to organize and regulate the state military. It divided the militia into two divisions (commanded by major generals), and each division into two brigades (commanded by brigadier generals).[153] The militia in each county formed a separate regiment (commanded by a colonel).[154] Regiments were further divided into battalions and companies.[155]

Each brigade was to have a brigade judge advocate (with the rank of major), and each regiment was to have a regimental judge advocate (with the rank of captain).[156] Legislation provided for the establishment of courts martial at every level of the military and established regulations and procedures for the conduct of the courts martial. Moreover, the legislature adopted the rules and regulations of the courts martial of the United States army to the extent they were not inconsistent with state statutes.[157]

Regular courts martial were established at three levels: companies, regiments, and brigades. The company courts martial consisted of the commanding officer of the company (as president) and two other officers appointed by him.[158] They

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the Jurisdiction and Powers of Justices of the Peace in this State and for other Purposes" § 7, 1831 [Dec. 15, 1830] Miss. Laws 20, LAWS MISS. 1824-38, *supra* note 90, 357. The requirement did not apply "if both cannot attend," *id.*; nor did it apply in every county, *id.* § 10, [Dec. 15, 1830] 1831 Miss. Laws 20, LAWS MISS. 1824-38, *supra* note 90, 358 (providing that Adams as well as Claiborne were exempt from Act).

[153] Act to Reduce into One the Several Acts Concerning the Organization and Discipline of the Militia of this State §§ 1-2, June 1822 Miss. Laws 386, REV. CODE MISS. 1824, *supra* note 77, at 420.

[154] *Id.* §§ 3-4, June 1822 Miss Laws 386-87, REV. CODE MISS. 1824, *supra* note 77, at 420.

[155] *Id.* § 4, June 1822 Miss. Laws 386, REV. CODE MISS. 1824, *supra* note 77, at 420.

[156] *Id.* § 5, June 1822 Miss. Laws 387, REV. CODE MISS. 1824, *supra* note 77, at 421. The brigade judge advocate was appointed by the brigadier general, and the regimental judge advocate by the colonel of the regiment—and commissioned by the governor. Id. § 9, June 1822 Miss. Laws 388, REV. CODE MISS. 1824, *supra* note 77, at 422.

[157] *Id.* § 39, June 1822 Miss. Laws 399, REV. CODE MISS. 1824, *supra* note 77, at 432.

[158] Act to Reduce into One the Several Acts Concerning the Organization and

sat every three months.[159] The courts martial established at the brigade and regimental levels consisted of seven officers,[160]

and in addition to trial jurisdiction, the regimental courts martial heard appeals from company courts, and the brigade court martial heard appeals from regimental courts—except in cases appealed from the company courts martial.[161] Brigade courts martial sat once a year,[162] and regimental ones sat twice a year.[163] Each brigadiere judge advocate attended courts martial in his brigade where he administered oaths, recorded testimony, and generally made sure the proceedings were conducted in a legal manner.[164] The regimental judge advocates played the same role at courts martial conducted at the regimental level.[165]

The Act imposed a rigid schedule of fines for specific infractions ranging from improper uniform to desertion.[166] The

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Discipline of the Militia of this State § 38, June 1822 Miss. Laws 399, REV. CODE MISS. 1824, *supra* note 77, at 432.

[159] *Id.* § 20, June 1822 Miss. Laws 393, REV. CODE MISS. 1824, *supra* note 77, at 426.

[160] *Id.* § 37, June 1822 Miss. Laws 399, REV. CODE MISS. 1824, *supra* note 77, at 432. Five members constituted a quorum. The brigade court's martial officers had to hold ranks of captain and higher, and at least one needed to be a colonel. Id. An order by the governor was required to try a major general. The court consisted of nine officers (with at least one general and three colonels). *Id.* Courts trying adjutant generals and quarter master generals were likewise ordered by the governor and required at least two colonels. *Id.* § 33, June 1822 Miss. Laws 397, REV. CODE MISS. 1824, *supra* note 77, at 430. Courts trying all other officers were composed of officers of the rank of major and higher and needed at least two colonels. *Id.* § 34. June 1822 Miss. Laws 398, REV. CODE MISS. 1824, *supra* note 77, at 431.

[161] *Id.* § 41 June 1822 Miss. Laws 400, REV. CODE MISS. 1824, *supra* note 77, at 432-33.

[162] *Id.* § 17, June 1822 Miss. Laws 391, REV. CODE MISS. 1824, *supra* note 77, at 425.

[163] Act to Reduce into One the Several Acts Concerning the Organization and Discipline of the Militia of this State § 18, June 1822 Miss. Laws 392, REV. CODE MISS. 1824, *supra* note 77, at 426.

[164] *Id.* § 28, June 1822 Miss. Laws 395, REV. CODE MISS. 1824, *supra* note 77, at 429.

[165] *Id.* § 29, June 1822 Miss. Laws 396, REV. CODE MISS. 1824, *supra* note 77, at 429.

[166] *Id.* § 43, June 1822 Miss. Laws 400-01, REV. CODE MISS. 1824, *supra* note

courts martial tried officers charged with "disobedience of orders, neglect of duty, unofficerlike conduct and behavior, disrespect to a superior officer, or any other unmilitary or ungentlemanly conduct whilst on duty . . . ."[167] The legislature limited punishments to fines and cashiering.[168]

In 1830 the legislature enacted an entirely new military code[169] which restated the power to arrest and prosecute officers for unofficer-like conduct, authorizing fines up to 100 dollars and cashiering of the convicted offender.[170] The requirement that company courts martial meet three times a year[171] was soon amended to require four meetings each year[172]—with jurisdiction over all offenses committed by non-commissioned troops.[173] As before, appeals lay to the regimental courts martial,[174] which met twice yearly.[175] Appeals (in

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77, at 433-34.

[167] *Id.* § 35, June 1822 Miss. Laws 398, REV. CODE MISS. 1824, *supra* note 77, at 431.

[168] Act to Reduce into One the Several Acts Concerning the Organization and Discipline of the Militia of this State § 36, June 1822 Miss. Laws 399, REV. CODE MISS. 1824, *supra* note 77, at 431.

[169] Act to Revise the Militia System, Jan. 1830 Miss. Laws 116-55, LAWS MISS. 1824-38, *supra* note 90, at 254-88.

[170] *Id.* art. 20, § 1, Jan. 1830 Miss. Laws 142, LAWS MISS. 1824-38, *supra* note 90, at 277 (prohibiting "disobedience of orders, neglect of duty, un-officer-like conduct and behaviour, disrespect to a superior officer, or any other unmilitary or ungentlemanly conduct, whilst on duty").

As in the repealed statutes, the new code incorporated the "rules and regulations observed in the army of the United States, that do not infringe the provisions of this act" *Id.* art. 21, § 21, Jan. 1830 Miss. Laws 150, LAWS MISS. 1824-38, *supra* note 90, at 284.

[171] *Id.* art. 21, § 1, Jan. 1830 Miss. Laws 143, LAWS MISS. 1824-38, *supra* note 90, at 278.

[172] Act to Alter and Amend an Act Entitled "Act to Revise the Militia System" § 9, Dec. 1830 Miss. Laws 78, LAWS MISS. 1824-38, *supra* note 90, at 326.

[173] Act to Revise the Militia System, art. 21, § 3, Jan. 1830 Miss. Laws 143-44, LAWS MISS. 1824-38, *supra* note 90, at 278.

[174] *Id.* art. 21, § 6, Jan. 1830 Miss. Laws 145, LAWS MISS. 1824-38, *supra* note 90, at 279.

[175] Their composition was altered slightly so that the colonel or commanding officer of the regiment sat as president with the lieutenant-colonel, major, and four senior captains—or in their absence the other highest ranking regimental officers. *Id.* art 21, § 7, Jan. 1830 Miss. Laws 145, LAWS MISS. 1824-38, *supra* note 90, at 279-80.

all cases other than appeals from company courts martial) still lay to the brigade courts martial[176] held once a year.[177] The judge advocates of the brigade and regiment were still obligated to attend all courts martial in their respective units.[178] The brigade courts martial decisions were final when they sat on appeals from regimental courts, but decisions in cases originating at the brigade level were appealable to the governor.[179]

Gaps and Loopholes. The constitution of 1817 prohibited the superior circuit courts from exercising original jurisdiction in civil actions where the matter did not exceed fifty dollars.[180] In creating the county courts and justices of the peace, the legislature explicitly granted these inferior courts original civil jurisdiction over cases lower than fifty dollars. But the legislation also specifically itemized the kinds of civil actions those inferior courts could hear. In general, these inferior courts received jurisdiction over contract and quasi-contract claims. Notably absent from the express grants of jurisdiction were the tort claims that would have been classed, at that time, as trespass and trespass on the case. There was a similar gap with respect to cases seeking equitable relief in which the value of the case did not rise to fifty dollars (the starting point of the chancellor's jurisdiction). The legislature never created inferior courts of equity, nor did it bestow equity jurisdiction on the county courts or justices of the peace.

Consequently, it is not clear what court had jurisdiction

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[176] *Id.* art. 21, § 9, Jan. 1830 Miss. Laws 146, LAWS MISS. 1824-38, *supra* note 90, at 280.

[177] *Id.* art. 21, § 13, Jan. 1830 Miss. Laws 147, LAWS MISS. 1824-38, *supra* note 90, at 781-82. The legislation provided that the composition of the brigade court martial would remain the same with the brigadier general serving as president. *Id.* Specially composed courts were required for officers and for trials of the highest ranking officers. *Id.* art. 21, §§ 18, 19, Jan. 1830 Miss. Laws 149-50, LAWS MISS. 1824-38, *supra* note 90, at 284.

[178] *Id.* art. 21, §§ 7, 14, Jan. 1830 Miss. Laws 145, 148, LAWS MISS. 1824-38, *supra* note 90, at 280, 282.

[179] *Id.* art. 21, § 15, Jan. 1830 Miss. Laws 148, LAWS MISS. 1824-38, *supra* note 90, at 282.

[180] MISS. CONST. of 1817, art. V, § 4 ("The Superior Court shall have original jurisdiction in all matters, civil and criminal, within this State, but in civil cases, only where the matter or sum in controversy exceeds fifty dollars.").

over tort cases and equity suits when the damages did not exceed fifty dollars. The legislature attempted to vest general jurisdiction in the circuit courts, despite the monetary limit on superior court jurisdiction in the constitution.[181] But the circuit court received jurisdiction over only those cases not within another court's jurisdiction; thus, if county court had jurisdiction over tort actions below fifty dollars, then the circuit court did not.[182]

The legislature avoided the theoretical conflict between circuit and county court jurisdiction by simply adjusting the jurisdiction of the county court. The 1824 amendments amounted to a wholesale elimination of civil jurisdiction in county courts[183] and left the county courts (as distinct from the pro-

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[181] The legislature limited circuit court civil jurisdiction only over those contract and quasi-contract cases given to county court and justices of the peace. The Act provided chancery court jurisdiction, without monetary limits over "all other civil suits and actions, real, personal and mixed, and all causes, matters and things arising under the constitution and laws of this state, not expressly cognizable in some other court, established by law. . . . " Act to Reduce into One, the Several Acts and Parts of Acts Concerning the Establishment, Jurisdiction and Powers of the Superior Courts of Law § 16, June 1822 Miss. Laws 30, REV. CODE MISS. 1824, *supra* note 77, at 105.

[182] It is possible that the legislature may have assumed—perhaps from the designation of county courts as courts "of law"—that tort actions might be brought in the county courts when damages sought did not exceed fifty dollars. For example, a statute limiting recovery of costs in actions of assault and battery and trespass to land referred to "any court of law" rather than to the circuit court. Act for the Limitation of Actions and Certain Proceedings in Civil Cases and for Preventing Frivolous and Vexatious Suits § 17, June 1822 Miss. Laws 258, REV. CODE MISS. 1824, *supra* note 77, at 187. So, too, the statute imposing liability upon owners for the trespasses of their animals provided for recovery "in any court of competent jurisdiction." Act to Prevent Trespasses in Certain Cases and Declaring What Shall Be Deemed a Lawful Enclosure § 1, June 1822 Miss. Laws 297, REV. CODE MISS. 1824, *supra* note 77, at 334. That county courts were probably meant to be included in the designation of "any court of competent jurisdiction" is supported by the use of the term to designate fora from which penalties might be recovered under another section, which explicitly granted jurisdiction to justices of the peace or any court of competent jurisdiction. *Id.* § 7, June 1822 Miss. Laws 298, REV. CODE MISS. 1824, *supra* note 77, at 336. Because justices of the peace were authorized to impose the fine, it may be inferred that the statute meant to grant such power also to county courts.

[183] The statute provided:

> [S]o much of the act, entitled "an act, concerning the establishment,

bate courts) to operate principally as slave courts.[184] From then on, the circuit courts exercised original jurisdiction over that category of tort cases less than fifty dollars that was not within justice of the peace jurisdiction. While this exercise of jurisdiction was apparently inconsistent with the limitation of superior court jurisdiction in the constitution, it demonstrated the powerful institutional endurance of the circuit courts, which continued—notwithstanding the language of the constitution—to exercise the broad, residual jurisdiction enjoyed by the old territorial circuit courts.

III. COURTS UNDER THE CONSTITUTION OF 1832

The constitution of 1817 provided for its own amendment only by means of a legislatively convened constitutional convention.[185] Growing political dissatisfaction with parts of the constitution led the legislature in 1831 to summon a convention,[186] and the proceedings resulted in a new constitution in

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> jurisdiction and powers of inferior courts of law in the several counties of this state," (the county of Monroe excepted) as gives to the county courts original and appellate jurisdiction, of suits or actions, for the recovery of money, where the matter in controversy exceeds twenty dollars, be, and the same is hereby repealed: and no venire facias shall issue from said court, except for the trial of slaves; and all appeals from a justice of the peace, where the matter in controversy exceeds twenty dollars, shall in future lie to the circuit courts respectively, where they shall be tried in the same manner, as such cases have heretofore been tried in the county courts.

Act to Establish a Court of Probate § 4 [Jan. 23, 1824], LAWS MISS. 1824-38, *supra* note 90, at 54. Pending cases where the amount in controversy exceeded twenty dollars were transferred to circuit court. *Id.* § 5 [Jan. 23, 1824], LAWS MISS. 1824-38, *supra* note 90, at 54 (providing that Monroe County was excepted).

[184] The same Act also eliminated the appellate jurisdiction of the county courts over justices of the peace in cases where the matter exceeded twenty dollars and directed that such appeals in the future lie to the circuit courts—except for Monroe county. *Id.* § 4 [Jan. 23, 1824], LAWS MISS. 1824-38, *supra* note 90, at 54.

[185] MISS. CONST. of 1817, Mode of revising the constitution, § 1.

[186] Act for Holding a Convention in this State, Dec. 1831 Miss. Laws 99-103, Laws Miss. 1824-38, *supra* note 90, at 375-78. The legislature had recommended a convention in the previous term. Though there had been no referendum—none being required—the preamble to the Act recited that "a majority of the citizens of this state, voting for representatives, have voted for a convention." *Id.* pmbl., Dec. 1831 Miss. Laws, 99, LAWS MISS. 1824-38, *supra* note 90, at 375.

1832. In focusing on the changes made in 1832, scholars have probably exaggerated the differences between the two constitutions. The constitution of 1832 followed the format of that of 1817 and preserved large parts of the 1817 text. Indeed, the drafters saw themselves as amending and revising the fundamental law, rather than radically altering it. This is evidenced by the fact that the drafters styled the new document the "Revised Constitution."[187]

The basic tripartite structure of government was retained; certain provisions gave the General Assembly judicial powers to impeach,[188] to punish members for disorderly behavior,[189] and to punish nonmembers for contempt.[190] These provisions copied the 1817 constitution verbatim.[191]

There were radical changes to the courts. First, the new constitution authorized chancery courts to grant divorces.[192] Second, it required that judges be elected by popular vote on all levels.[193] Moreover, the new constitution clearly distinguished

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[187] MISS. CONST. of 1832.

[188] *Id.* art. VI, §§ 1-2. The only change was the addition of a separate number for the article on impeachments. *See* MISS. CONST. of 1817, Impeachments.

[189] MISS. CONST. of 1832, art. III, § 16. *See* MISS. CONST. of 1817, art. III, § 16.

[190] MISS CONST. of 1832, art. III, § 20. *See* MISS. CONST. of 1817, art. III, § 20.

[191] The revised constitution retained the provision that gave the legislature the authority to remove judges for "wilful neglect of duty or other reasonable causes" by two-thirds vote of both houses. MISS. CONST. of 1832, art. IV, § 27. But judges of probate and justices of the peace could be removed from office after indictment and jury trial. *Id.* § 28.

[192] "Divorces from the bonds of matrimony shall not be granted but in cases provided for by law, by suit in chancery." *Id.* art. VII, § 15. Though this was phrased as a restrictive treatment of divorce, it actually greatly facilitated the procedures for obtaining divorce. Under the constitution of 1817, divorces required two-thirds approval by both houses of the General Assembly, after suit in chancery. MISS. CONST. of 1817, art. VI, § 17. The legal restrictions apparently did not assure family stability. There was an average of five private acts of divorce per year—extrapolating from the private acts of divorce reported for 1817 to 1822. *See generally* REV. CODE MISS. 1824, *supra* note 77, at 573-75 (listing various divorces). Judge Poindexter was himself divorced. See Swearingen, *supra* note 72, at 133-34.

[193] MISS. CONST. of 1832, art. IV, §§ 2, 5 (providing for election of judges for High Court of Errors and Appeals); *id.* § 11 (providing for election of circuit court

courts of chancery from the circuit courts. Finally, the constitution gave the legislature the power to establish inferior courts (not inferior and superior ones);[194] however, rather than delegating the lower court system entirely to the legislature, the constitution itself created five courts.[195]

High Court of Errors and Appeals. The jurisdiction of the high court was limited to appellate jurisdiction, and its limited jurisdiction was emphasized by its new name, "The High Court of Errors and Appeals:" "[T]he High Court of Errors and Appeals shall have no jurisdiction but such as properly belongs to a court of errors and appeals."[196] The court itself ruled that such appellate jurisdiction did not give it authority to decide a fictitious case.[197] In a particularly troubling opinion (published in 1867), the high court acknowledged that the constitutional grant of appellate jurisdiction was vague, and it basically deferred to legislation that regulated and, in effect, limited the high court's appellate jurisdiction.[198]

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judges); *id.* § 16 (concerning election of chancellor); *id.* § 18 (providing for election of probate court judges); *id.* § 23 (providing for election of justices of peace). The constitution also provided that the attorney general and clerks of all the courts were to be elected. MISS. CONST. of 1832, §§ 1 & 25.

[194] *Id.* § 24 ("The legislature may from time to time establish such other inferior courts as may be deemed necessary, and abolish the same whenever they shall deem it expedient.").

[195] "The judicial power of this state shall be vested in one High Court of Errors and Appeals, and such other courts of law and equity as are hereafter provided for in this constitution." *Id.* § 1.

[196] *Id.* § 4. Appellate jurisdiction included supervisory jurisdiction to issue extraordinary writs, and the court may have been burdened with such practice, for legislation in 1856 specifically provided that "hereafter no judge of the high court of errors and appeals shall, during the session of said court, be required to grant, try or hear any writ of *habeas corpus*, unless such judge shall, of his own accord, choose to grant the same." Act in Relation to Writs of Habeas Corpus § 1, 1856 Miss. Laws 33.

The court policed its own limited jurisdiction and struck a case where it noticed the absence of a bond that was a prerequisite for a writ of error even though the appellee had not brought the defect to the court's attention. Stamps v. Newton, 4 Miss. (3 Howard) 34, 34 (1838) (stating that "we are bound to inquire in every case, whether the facts presented by the record give this tribunal a jurisdiction").

[197] Bank of Port Gibson v. Dickson, 12 Miss. (4 S. & M.) 689, 690 (1842) (striking cause from its docket challenging tax assessment that was not made).

[198] Dismukes v. Stokes, 41 Miss. 430 (1867). The court held that a statute that

The high court was composed of three judges.[199] Each judge was elected from a different district,[200] and the judges served staggered six-year terms.[201] The constitution required the court to sit twice a year.[202]

The high court had appellate jurisdiction over cases before the circuit court, whether in law or equity.[203] Although the legislature did not expressly give the court appellate jurisdic-

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provided for appeal to the circuit court from the boards of police, thereby making the circuit court's determination "final," did not improperly limit the high court's appellate jurisdiction. *Dismukes*, 41 Miss. at 433.

> [W]hen we come to determine what matters 'properly belong to a Court of Errors and Appeals,' we . . . have to refer for the solution of the question to other sources than these provisions of the constitution. The subject is one depending on general considerations of public policy, which, for the most part, must be determined by the legislature . . . .

Id. Concluding that a right to prosecute a writ of error was more a remedy (within the legislature's power to regulate procedure) than a guaranteed right, the high court dismissed the appeal. *Id. See also* Robertson v. Williams, 7 Miss. (6 Howard) 579, 579 (1842) (stating that forcible entry and detainer action could not be appealed to High Court of Errors and Appeals when remedy existed through appeal to circuit court).

[199] MISS. CONST. of 1832, art. IV, § 2.

[200] *Id.* (directing legislature to divide state into three districts for election of justices). The legislature initially divided the state up into the same three districts both for the High Court of Errors and Appeals and for the Superior Court of Chancery. Act to Divide this State into Three Districts for the election of Judges of the High Court of Errors and Appeals, and for the Superior Court of Chancery §§ 1-3, Jan. 1839 Miss. Laws 82. But it later altered the high court's districts. *See* Act to Regulate the Districts § 1, 1840 Miss. Laws 78-79.

Two of the judges of the high court formed a quorum. MISS. CONST. of 1832, art. IV, § 2. The constitution provided that when a quorum could not hear a case, because two or more of the judges were disqualified by interest or relationship, the governor was to appoint a special commission to sit as the supreme court. *Id.*

[201] MISS. CONST. of 1832, art. IV, §§ 2-3.

[202] *Id.* § 7. The constitution provided that for four years the court was to sit wherever the legislature directed,; but after 1836 it was to sit in Jackson. *Id.* art. III, § 30. Later legislation required it to sit in different places and restricted the court's jurisdiction to cases from the district. The court held, however, that such a restriction was unconstitutional because it had the effect of reducing the number of court terms. *See* Opinion of the Court Construing the Act of the Legislature, Approved February 21, 1867, 41 Miss. 54, 58 (1866).

[203] Act to Organize and Establish Circuit Courts and to Define Their Powers and Jurisdiction in Law and Equity § 15, Jan. 1833 Miss. Laws 32-33, LAWS MISS. 1824-38, *supra* note 90, at 407.

tion over the chancellor, the court could apparently review the chancery court decisions by appeal or writ of error.[204] Indeed, in 1844 the legislature significantly expanded the high court's supervisory jurisdiction over chancery by providing that any decision by the chancellor or vice chancellor overruling a demurrer was appealable as a matter of right to the high court.[205] There were two cases where the high court exercised superior jurisdiction over the chancellor: (1) cases in chancery court in which the state was a defendant could be appealed to the high court of errors and appeals,[206] and (2) individual judges of the high court of errors and appeals could review the chancellor's sanctions for contempt imposed by the chancellor between regular terms of chancery court.[207] In 1844 the high court also began to exercise appellate jurisdiction over probate courts.[208]

It is interesting to observe, in an age that now seeks to discourage the writing of appellate opinions,[209] that the legislature required the high court to file a written opinion in every

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[204] Despite the title of the Act, the legislation did not further describe the supreme court's jurisdiction. *See* Act to Establish and Organize the High Court of Errors and Appeals, and to Define the Powers and Jurisdiction Thereof, Jan. 1833 Miss. Laws 132-36, LAWS MISS. 1824-38, *supra* note 90, at 440-43.

The high court practice of reviewing chancery decisions is referred to in the 1842 statute creating the vice chancery court, and certain vice chancery decrees were appealable directly to the high court. *See infra* notes 260-65.

[205] Act for the More Perfect Organization of the Superior Court of Chancery § 3, 1844 Miss. Laws 123-24.

[206] Act to Designate in What Manner, and in What Courts, Suits May Be Brought Against the State of Mississippi § 1, Jan. 1833 Miss. Laws 205-06, LAWS MISS. 1824-38, *supra* note 90, at 475-76.

[207] Act to Establish and Organize a Separate Superior Court of Chancery, and Define the Powers and Jurisdiction Thereof § 4, Jan. 1833 Miss. Laws 36, LAWS MISS. 1824-38, *supra* note 90, at 410.

[208] *See infra* text accompanying note 291.

[209] *See* MISS. R. APP. P. 35-A(a) (requiring written opinion only if damages are assessed for frivolous appeal or if majority of justices or judges decide that written opinion will add to state jurisprudence, be useful to parties, or be useful to trial court). Moreover, even when an opinion is written, it is published only in certain defined cases. MISS. R. APP. P. 35-A(b)-(c). Written but unpublished opinions may not be cited, quoted, or referred to. MISS. R. APP. P. 35-A(d). For its entire first year, the court of appeals was required to write opinions in every case but prohibited from publishing any of them. MISS. R. APP. P. 35-B(a).

case "stating at large the reasons and principles upon which such decision is made" and further requiring every dissenting judge to "reduce his opinion to writing and the reasons therefor," and making the refusal to write an opinion a misdemeanor and cause for removal.[210]

Despite constitutional language limiting the court's jurisdiction to appellate matters, the legislature in 1841 extended to individual judges of the high court power to issue "writs of injunction and *ne exeat*, orders requiring bail in chancery, orders for receivers as well as all other remedial orders and process."[211]

Circuit Courts. Circuit courts were established for districts comprising between three and twelve counties.[212] The legislature initially created four districts;[213] and two were added in late 1833,[214] two in 1836,[215] one in 1837.[216] By 1840 there were eleven judicial districts,[217] but they were reorganized in-

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[210] Act to Establish and Organize the High Court of Errors and Appeals § 8, Jan. 1833 Miss. Laws 134-35, LAWS MISS. 1824-38, *supra* note 90, at 442-43.

The Legislature would also require in 1842 the reporting of the chancery court decisions "or so much thereof as the Chancellor shall direct. . . ." Act to Provide for Reporting the Decisions of the Superior Court of Chancery § 1, 1842 Miss. Laws 210.

[211] Act to Amend the Laws Relating to Injunctions and Supersedeas Bonds and Sales in Chancery § 1, 1841 Miss. Laws 123-24.

[212] MISS. CONST. of 1832, art. IV, §§ 11, 13. The circuit judge (unlike the supreme court judge) was explicitly required to reside in the district from which he was elected. *Id.* § 11. But the omission of a residency requirement for supreme court judges was probably an oversight, as the constitution also omitted such a requirement for probate judges and justices of the peace. The drafters probably did not envisage inferior court judges, let alone justices of the peace, residing outside their counties.

[213] Act to Organize and Establish Circuit Courts and to Define Their Powers and Jurisdiction in Law and Equity § 1, Jan. 1833 Miss. Laws 23, LAWS MISS. 1824-38, *supra* note 90, at 400.

[214] Act to Amend an Act to Organize and Establish Circuit Courts §§ 2, 3, Dec. 1833 Miss. Laws 22, LAWS MISS. 1824-38, *supra* note 90, at 501.

[215] Act Further to Amend an Act to Organize and Establish Circuit Courts §§ 1-3, 1836 Miss. Laws 39-40, LAWS MISS. 1824-38, *supra* note 90, at 557-58.

[216] Act to Establish a Ninth Judicial Circuit § 1, 1837 Miss. Laws 181, LAWS MISS. 1824-38, *supra* note 90, at 685.

[217] Act to Reorganize the Judicial Districts and to Abolish the Criminal Court § 1, 1840 Miss. Laws 30.

to seven districts in 1844[218] and then into ten in 1856.[219]

The constitution defined the jurisdiction of the circuit court in the same terms as that given to the superior (circuit) courts in 1817—"original jurisdiction in all matters, civil and criminal, within this State; but in civil cases only when the principal of the sum in controversy exceeds fifty dollars."[220] The plaintiff's demand established the amoung in controversy unless it was inflated improperly to create jurisdiction.[221] Separate claims could be added together to satisfy the jurisdictional amount,[222] and defenses did not affect jurisdiction.[223] The legislative grant of jurisdiction was also identical to the legislation defining circuit court jurisdiction under the constitution of 1817.[224] Thus, the courts retained original jurisdiction over actions of contract and quasi-contract only when the amount exceeded fifty dollars; and they exercised general original jurisdiction over all other civil and criminal cases not given exclusively to some other court.[225] Further, they continued to have broad remedial power to issue extraordinary writs.

In a change from the 1817 statute, the legislature inserted language which granted "such appellate jurisdiction as by law may be vested in said court."[226] Circuit courts exercised ap-

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[218] Act to Reorganize the Judicial Districts, 1844 Miss. Laws 110-17.

[219] Act to Reorganize the Judicial Districts, 1856 Miss. Laws 34-35.

[220] MISS. CONST. of 1832, art. IV, § 14.

[221] Griffin v. Lower, 37 Miss. 458, 460-61 (1859).

[222] Cocke v. Board of Police of Copiah County, 38 Miss. 340, 342 (1860) (permitting aggregation of separate $1.50 fines to exceed $50).

[223] Boone v. Poindexter, 20 Miss. (12 S. & M.) 640, 647 (1849).

[224] *Compare* Act to Organize and Establish Circuit Courts § 5, Jan. 1833 Miss. Laws 27-28, LAWS MISS. 1824-38, *supra* note 90, at 403-04 *with* Act to Amend an Act to Reduce into One the Several Acts and Parts of Acts Concerning the Establishment, Jurisdiction and Powers of the Superior Courts of Law § 16, June 1822 Miss Laws 30, REV. CODE MISS. 1824, *supra* note 77, at 105-06.

[225] Excluded were those matters "as may be exclusively had before a justice of the peace, or in some other court of this state, or of the United States. . . . " Act to Organize and Establish Circuit Courts § 5, Jan. 1833 Miss. Laws 27-28, LAWS MISS. 1824-38, *supra* note 90, at 404.

[226] *Id.* In another change, the legislature redefined replevin to permit recovery of any personal property. For some reason the original replevin statute authorized "replevin" only for distraint (or unpaid rent). Now it was given its broader common-law scope, and jurisdiction was conferred on the circuit courts—somewhat

pellate jurisdiction over justices of the peace.[227] Cases tried before a justice of the peace were appealable (by writ of certiorari[228]) to the circuit court, where they were tried de novo. One defendant unsuccessfully challenged this practice by pointing out that such cases were not within the circuit court's original jurisdiction (because they were necessarily below its jurisdictional amount in order to be brought before a justice), but the high court held that the trial de novo process was an extension of the justice's trial rather than an exercise of original, appellate jurisdiction.[229] The supervisory role of circuit courts was further expanded in 1854 when the legislature authorized circuit courts to issue writs of error and supersedeas in misdemeanor prosecutions.[230] The constitution required circuit courts to sit at least twice a year in each county.[231] Despite their broad general jurisdiction, circuit courts could not acquire subject-matter jurisdiction over matters outside their competence by consent of the parties.[232] On the other hand, a pre-

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redundantly as they already enjoyed general jurisdiction over all personal actions. *See id.* § 21, Jan. 1833 Miss. Laws 34-35, LAWS MISS. 1824-38, *supra* note 90, at 409. This expansion of replevin proved unpopular, however, for it was repealed a few years later. Act to Repeal the Law Extending the Action of Replevin § 1, 1836 Miss. Laws 98, LAWS MISS. 1824-38, *supra* note 90, at 577. The procedure was adjusted and consolidated. 1843 Miss. Laws 65-67.

[227] Act to Declare in Force the Several Acts Concerning the Mode of Election and Jurisdiction of Justices of the Peace in this State and for Other Purposes § 4, Jan. 1833 Miss. Laws 203, LAWS MISS. 1824-38, *supra* note 90, at 474-75. *See also* Act to Authorize Appeals from the Decisions of Justices of the Peace to the Circuit Courts §§ 1-2, 1842 Miss. Laws 136 (allowing appeal within five days after declaration of original judgment).

[228] *See* Porter v. Deterly, 9 Miss. (1 S. & M.) 163, 165 (1843).

[229] Hurd v. Tombes 8 Miss. (7 Howard) 229, 233 (1843) (holding that circuit court had proper appellate jurisdiction because action originated in proceedings before justice).

[230] Act to Extend the Act Approved March the 9th, 1850, § 1, 1854 Miss. Laws 101.

[231] MISS. CONST. of 1832, art. IV, § 15; Act to Organize and Establish Circuit Courts § 4, Jan. 1833 Miss. Laws 24-25, LAWS MISS. 1824-38, *supra* note 90, at 401. In 1839, the legislature repealed the power of the circuit court to hold special terms "except when the regular term shall have failed." Act to Amend an Act Entitled "Act to Organize and Establish Circuit Courts" § 1, Jan. 1839 Miss. Laws 85.

[232] *E.g.*, *Hurd*, 8 Miss. at 233.

sumption of correctness attached to a circuit court's determination of its own jurisdiction.[233]

The constitution of 1832 expressly authorized the legislature to give circuit courts jurisdiction over matters in equity so long as the amount in controversy did not exceed five hundred dollars.[234] The legislature quickly conferred concurrent equity jurisdiction on the circuit courts:

> [T]he said Circuit Courts shall have and possess original and concurrent jurisdiction with the Superior Court of Chancery, over all matters, pleas and plaints whatsoever, belonging to or cognizable in a court of equity, where the value of the thing or amount in controversy does not exceed the value of five hundred dollars; also in cases of divorce, and for the foreclosure of mortgages; and such process and course of proceedings shall be had herein as in similar cases are commonly had in the Superior Court of Chancery.[235]

Notwithstanding this language imposing chancery court practice on the circuit courts, the legislature required trial by jury for all matters of fact.[236]

The legislature sought repeatedly to enlarge the equity jurisdiction of the circuit courts. In 1839 it voted to propose a constitutional amendment for a referendum that stated,[237] "A

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[233] Cannon v. Cooper, 39 Miss. 784, 789 (1861).

[234] MISS. CONST. of 1832, art. IV, § 16.

[235] Act to Organize and Establish Circuit Courts § 6, Jan. 1833 Miss. Laws 28-29, LAWS MISS. 1824-38, *supra* note 90, at 404.

[236] *Id.* § 7, Jan. 1833 Miss. Laws 29, LAWS MISS. 1824-38, *supra* note 90, at 404. The Act provided:

> [I]n all actions, suits and controversies in equity that may be instituted in the circuit courts, according to the provisions of this act, whenever an issue or issues as to matters of fact shall be made up by the parties, or under the direction of the court, touching the merits of the case in question, it shall be the duty of the court to empanel a petit jury to try said issue or issues; and the jury so empanelled, may render a specified [sic] verdict therein, whereby the court may be enabled to found a decree. Said jury, by consent of the parties, under the special charge and instructions of the court as to matters of law, may render a general verdict.

Id.

[237] I believe this was the first amendment proposed for the constitution of

separate superior court of chancery shall be established, with full jurisdiction in all matters of equity: *Provided, however,* the legislature may also give to the circuit courts of each county equity jurisdiction."[238] This proposed amendment would have enlarged the circuit courts' concurrent equity jurisdiction by removing from the constitution the monetary limits on circuit court equity jurisdiction. At the same time—and perhaps unintentionally—it apparently would have eliminated the power of circuit courts to grant divorces and foreclose mortgages. The legislature did not approve the amendment.[239] Nevertheless, in 1841 the legislature extended to circuit judges the power to issue "writs of injunction and *ne exeat*, orders requiring bail in chancery, orders for receivers as well as all other remedial orders and process."[240] But circuit courts had no jurisdiction to enjoin conduct outside their districts.[241] In 1846 legislation

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1832.

[238] Act Proposing an Amendment to the Constitution of the State of Mississippi § 1, 1839 Miss. Laws 97.

[239] The amendment did not "prevail." *See* 1848 MISS. CODE 52.

[240] Act to Amend the Laws Relating to Injunctions and Supersedeas Bonds and Sales in Chancery § 1, 1841 Miss. Laws 123-24. The grant was repeated in 1848:

> That the judges of the several circuit courts of law in this State shall have power to grant writs of injunction, ne-exeat, and supersedeas, either in term time or in vacation, in all cases in which it may be proper to grant said writs or either of them, whether the case originated within or without the district of the judge granting the same; and the fiat of any such judge shall be sufficient to authorize the proper officer to issue any or either of said writs in pursuance thereof.

Act to Amend the Laws § 1, 1848 Miss. Laws 101-02. The Act expressly repealed all inconsistent legislation. *Id.* § 2, at 101. *See also* Act to Amend an Act § 2, Jan.-Mar. 1850 Miss. Laws 120 (granting power to circuit courts). In legislation later abolishing the separate courts of equity, the legislature specifically provided, "That the judges of the high court of errors and appeal, the chancellor and the judges of the circuit courts shall have full power to grant injunctions, attachments and other remedial process returnable to the circuit court of such county as shall have jurisdiction thereof. Act to Confer Equity Jurisdiction upon Circuit Courts § 3, 1856 Miss. Laws 28.

[241] Montgomery v. Commercial Bank of Rodney, 1 Rep. of Cases Argued & Determined in the Super. Ct. of Chancery (S. & M.) 632, 643-44 (1843). When legislation extended a circuit judge's authority to issue injunctions outside the district, the High Court of Errors and Appeals held that a judge from another district could not modify the injunction. Martin v. O'Brien, 34 Miss. 21, 38-39 (1857).

gave circuit courts and chancery courts concurrent jurisdiction to effect legal changes in names, legitimate offspring, and to make a person a petitioner's legal heir.[242] By 1857 the legislature amended the constitution to eliminate chancery and vice chancery courts; and the circuit courts assumed fully equity jurisdiction.[243]

Superior Court of Chancery and Inferior Courts of Chancery. The constitution of 1832 established a superior court of chancery under a single chancellor. But the system proved unpopular, so the legislature later eliminated the chancery jurisdiction by constitutional amendment. Proposed by the legislature in 1854,[244] the amendment was adopted in 1856 and became effective in 1857[245]—thereby abolishing the separate chancery courts and giving full equity jurisdiction to the circuit courts.[246] The evolution of the courts of chancery may have been influenced by contemporaneous legal developments in England.[247]

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[242] 1846 Miss. Laws 231.

[243] MISS. CONST. of 1832, amend. III, *in* REV. CODE MISS. 38 (1857); Act in Relation to Chancery Courts, art. 2, § II, 1856 Miss. Laws 37-38.

[244] Act to Amend the Constitution of the State of Mississippi in Relation to the Chancery Courts § 1, 1854 Miss. Laws 173-74. The Act provided:

> That the sixteenth section of the fourth article of the Constitution of the State of Mississippi, be stricken out and abrogated, and in lieu thereof the following section be adopted and inserted instead, viz:
>
> Section 16. Chancery Courts with full jurisdiction in all matters of equity, shall be held in each judicial district by the Circuit Judge thereof, at such times and places as may be directed by law. The Superior Court of Chancery, and the several Vice Chancery Courts shall continue as now organized, until the first Monday of November, one thousand eight hundred and fifty seven for the disposition of causes now depending therein.

Id. at 173.

[245] See MISS. CONST. of 1832, amend. III, *in* REV. CODE MISS. (1857).

[246] Legislation implementing the amendment conferred upon the chancery courts "all the powers and jurisdiction now held and possessed by the superior court of chancery" and specified that the circuit court clerks would serve as clerks for the unified chancery courts. Act to Confer Equity Jurisdiction upon Circuit Courts § 1, 1856 Miss. Laws 28.

[247] I do not think the influence of legal developments in England has ever been examined. But problems with the Chancery in England had led to the creation of a "vice chancellor" in 1818; more vice chancellors were added in 1842.

Prior to the amendment, the constitution of 1832 conferred full equity jurisdiction on a single chancellor, elected statewide, who served six years[248] with "full jurisdiction in all matters of equity . . . in all cases of divorce, and for the foreclosure of mortgages."[249] The language "full jurisdiction" was almost certainly meant to convey exclusive jurisdiction, because the constitution included a specific "[p]rovided, however" clause: "[t]he Legislature may give to the Circuit Court of each county, equity jurisdiction in all cases where the value of the thing, or amount in controversy, does not exceed five hundred dollars."[250] The statute granting equity jurisdiction omitted the language of "full jurisdiction."[251] Because the grant of exclusive jurisdiction applied only to equity, however, and not to divorce, or foreclosure of mortgages, the legislature could constitutionally confer concurrent jurisdiction over those matters upon the circuit court.[252] Notwithstanding this broad grant of equity jurisdiction, the legislature subsequently enacted specific grants of jurisdiction to quiet titles and remove clouds on titles[253] and to receive acknowledgments of deeds, trusts, and other instruments of conveyance.[254] As under prior practice,[255] courts of equity could also exercise jurisdiction over legal claims in a variety of ways.[256]

There was public discussion of proposals to merge equitable and legal jurisdiction as early as 1851, and in 1854 the law courts were given some equity jurisdiction. *See generally* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 131-33 (1990) (discussing courts of chancery in England during 1800s).

[248] MISS. CONST. of 1832, art. IV, § 16.

[249] *Id.*

[250] *Id.*

[251] Act to Establish and Organize a Separate Superior Court of Chancery, and Define the Powers and Jurisdiction Thereof § 4, Jan. 1833 Miss. Laws 36, LAWS MISS. 1824-38, *supra* note 90, at 410.

[252] *See supra* note 235 and accompanying text.

[253] Act to Quiet Land Titles to the Rightful Owners of Land in the State of Mississippi § 1, 1841 Miss. Laws 121.

[254] Act to Authorize and Empower the Chancellor and Vice Chancellors § 1, 1854 Miss. Laws 125.

[255] *See supra* notes 110-11.

[256] The need for discovery alone (which was available in equity but not at law) could establish equitable jurisdiction so that the court of equity could give complete relief. Huntington v. Grantland & Anderson, 33 Miss. 453, 455 (1857); *ac-*

As a court of limited jurisdiction, the chancery court could not acquire subject-matter jurisdiction by consent or waiver.[257] Even with the establishment of concurrent equity jurisdiction in circuit courts, the chancellor must have been overwhelmed with cases at times, for the legislature in 1838 proposed a constitutional amendment removing the monetary limits on circuit court equity jurisdiction.[258] After the proposed amendment failed to be approved, the legislature created an inferior court of chancery, called the District Chancery Court, for twenty-three northern counties, consisting of a Vice Chancellor elected from each of the counties.[259] The court had "concurrent power and jurisdiction within said district with the Superior Court of Chancery of this State, when the amount in controversy shall not exceed five hundred thousand dollars."[260] Cases could be removed to the superior court of chancery when the defendant resided outside the northern district of the vice chancellor,[261] when the vice chancellor agreed that justice so required,[262] or when all parties consented.[263] Decisions could be taken by appeal to the superior court of chancery

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cord Morton v. Grenada Academies, 16 Miss. (8 S. & M.) 773, 786 (1847).

[257] In Brown, Bros. & Co. v. Bank of Mississippi, 31 Miss. 454, 459-60 (1856), a plaintiff filed a creditor's bill before the entry of legal judgment that was a prerequisite for equity jurisdiction. Even though the defendant did not object to the bill, the court found no waiver and permitted subsequent demurrer, reasoning that "if consent cannot confer jurisdiction of the subject-matter, a mere negative act of waiver cannot have that effect." *Brown*, 31 Miss. at 460. Perhaps the result could be distinguished from Head v. Gervais, 1 Miss. (1 Walker) 431 (1831), discussed *supra* note 111, on the ground that the defendant in *Gervais* took active steps to place the matter in issue, despite the fact that it was originally outside the chancellor's jurisdiction.

[258] *See supra* notes 238-40 and accompanying text.

[259] Act to Establish an Inferior Court of Chancery in the Northern Part of this State § 1, 1842 Miss. Laws 57-65. The Act was an exercise of the legislature's constitutional authority to establish inferior courts. Houston v. Royston, 8 Miss. (7 Howard) 543, 551-52 (1843).

[260] *Id.* § 3, at 58.

[261] *Id.* § 9, at 61.

[262] *Id.* § 10, at 62.

[263] *Id.* § 11, at 62. Where a case filed in vice chancery court was within the concurrent jurisdiction of the chancellor, removal, not dismissal, was appropriate, and objections to the vice chancellor's jurisdiction were waived when no removal was requested. Harrington v. Mobbley, 33 Miss. 34, 35 (1857).

or, in the alternative, if all parties agreed, to the High Court of Errors and Appeals; and decisions could also be taken directly to the High Court of Errors and Appeals by way of a writ of error.[264] In 1846 the legislature created a second inferior court of chancery for the southern district.[265] The legislation required that the chancellor be elected from that district.[266] Then, in 1852 the legislature created a third inferior chancery court for the middle district.[267]

Legislation sought to limit the jurisdiction of the chancery courts and to make the chancellor more accountable in a number of ways. Chancery districts were first made coterminous with the three districts created for the High Court justices, but in 1841 the legislature divided the chancery court into four districts and permitted defendants to be tried only in the district in which they resided.[268] In 1842 the legislature required the chancellor to publish his decisions—"or so much thereof as the Chancellor shall direct. . . . "[269] In 1844 the legislature allowed defendants to appeal directly to the High Court of Errors and Appeals in any case in either the superior or district court of chancery that overruled a demurrer, without having first to answer the bill.[270]

By statute, the chancellor possessed original jurisdiction over cases in which the state was a defendant. In the event of a factual dispute, the chancellor was required to transfer the trial to a circuit court, where the action would proceed before a jury, and the verdict would be transmitted back to the chancery

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[264] Act to Establish an Inferior Court of Chancery § 16, 1842 Miss. Laws 63-64.

[265] Act to Establish Inferior Court of Chancery in the Southern Part of this State, 1846 Miss. Laws 106-16. The southern district's jurisdiction was defined in terms identical to that of the northern district's. *Id.* § 3, at 108.

[266] *Id.* § 4, at 108-09.

[267] Act to Establish an Additional Inferior Court of Chancery in the State of Mississippi §§ 1-3, Jan.-Mar. 1852 Miss. Laws 60-61.

[268] Act to Amend an Act to Divide this State into Three Districts § 1, 1841 Miss. Laws 130.

[269] Act to Provide for Reporting the Decisions of the Superior Court of Chancery § 1, 1842 Miss. Laws. 210.

[270] Act for the More Perfect Organization of the Superior Court of Chancery § 3, 1844 Miss. Laws 123-24.

court.[271] Later, however, the chancery courts were empowered to empanel juries in cases against the state.[272] Courts, however, did not construe this legislation to permit the chancellor to grant common-law relief against the state.[273] About the time the separate chancery courts were abolished the legislature also proposed abolishing suits against the state.[274]

The chancellor was originally required to hold court twice a year in Jackson,[275] but after the load was lightened by the creation of the northern vice chancery district, the legislature declared that "hereafter the Superior Court of Chancery held at Jackson shall, in law, be considered as always open. . . . "[276] Much of the fact-finding was effected through extra-judicial discovery, and depositions were encouraged by reforms in 1838.[277] Further reforms in 1839 permitted defendants to introduce new matter under oath and to serve cross bills without subpoena on parties already joined in an action.[278] The legislature also abolished the old equity requirement that a plaintiff

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[271] Act to Designate in What Manner and in What Courts Suits May Be Brought Against the State of Mississippi § 1, Jan. 1833 Miss. Laws 205-06, LAWS MISS. 1824-38, *supra* note 90, at 475-76.

[272] 1846 Miss. Laws 242. After the elimination of separate equity courts and the unification of the circuit and chancery jurisdiction, legislation provided that in certain actions to recover bonds under chancery jurisdiction, either party could request a jury. Act to Amend an Act in Relation to Chancery Courts in this State § 2, 1858 Miss. Laws 85.

[273] Farish v. State, 3 Miss. (2 Howard) 826, 829 (1838) (holding that chancellor had no jurisdiction in case seeking damages against state and construing legislation as limiting chancellor to "equity" jurisdiction). The court stated that, "[a]ny act which should confide to this [chancery] court jurisdiction over questions purely of law, would be clearly unconstitutional, because such questions are to be determined, in the first instance, by the circuit court." *Farish*, 3 Miss. (2 Howard) at 829.

[274] Act to Amend the Constitution of the State of Mississippi in Relation to Suits against the State § 1, 1856 Miss. Laws 35.

[275] Act to Establish and Organize a Separate Superior Court of Chancery § 5, Jan. 1833 Miss. Laws 36, LAWS MISS. 1824-38, *supra* note 90, at 410.

[276] Act Supplementary to an Act to Establish an Inferior Court of Chancery § 1, 1842 Miss. Laws 236.

[277] Act Concerning the Powers and Jurisdiction of the Superior Court of Chancery §§ 2-3, 1838 Miss. Laws 215-16, LAWS MISS. 1824-38, *supra* note 90, at 864.

[278] *Id.* § 1, 1838 Miss. Laws 214-15, LAWS MISS. 1824-38, *supra* note 90, at 863-64.

produce corroborating witnesses or circumstances in order to survive a defendant's denial.[279]

In addition to its original jurisdiction, the chancery court might permit the transfer of any equity suit pending in circuit court if the defendant and one other person made affidavits "that they do not believe that a fair trial of said cause can be had in the circuit court. . . . "[280] Though equity might in extraordinary cases enjoin the enforcement of a judgment, the chancellor had no superior jurisdiction to grant relief in disregard of circuit court chancery decrees in a matter within the concurrent jurisdiction of the chancellor and circuit courts.[281]

Legislative hostility to the separate chancery courts appeared by the 1830s, when the legislature went so far as to propose a constitutional amendment that would have given circuit courts jurisdiction over most equity matters. In 1857 the constitutional amendment abolished the chancery and vice chancery courts, leaving no separate Court of Chancery until the Constitution of 1868.[282]

Courts of Probate. Probate courts continued under the constitution of 1832 in each county, composed now of judges

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[279] *Id.* § 6, 1838 Miss. Laws 218, LAWS MISS. 1824-38, *supra* note 90, at 866.

[280] Act to Establish and Organize a Separate Superior Court of Chancery § 7, Jan. 1833 Miss. Laws 37, LAWS MISS. 1824-38, *supra* note 90, at 411. The transfer was effected by legal process through a writ of certiorari. The chancellor "shall also have power to grant bills of review in any judgment that may be rendered on the equity side of the Circuit Court in the same manner that bills of review are usually granted in Courts of Equity." *Id.* This apparently broad grant of power to review is misleading and did not establish superior appellate jurisdiction over the circuit courts. Bills of review were original actions (not appellate process) that would presumably have issued in a case upon removal. *See generally* Mercer v. Stark, 1 Rep. of Cases Argued and Determined in the Super. Ct. Chancery (S. & M.) 479, 485-86 (1841) (discussing bills of review).

[281] Tooley v. Kane, 1 Rep. Of Cases Argued and Determined in the Super. Ct. Of Chancery (S. & M.) 518, 522 (1842), *aff'd sub nom.* Tooley v. Gridley, 11 Miss. (3 S. & M.) 493, 516 (1844).

[282] Frank E. Everett, Jr. suggests that the motives for abolishing chancery courts were "not entirely clear" but he assumed them to be considerations of "convenience or economy." Everett, *supra* note 86, at 375, 377. Yet the persistence of the legislature's efforts to control the chancery court suggests that the legislature was equally concerned with the problem of the accessibility of equitable remedies.

elected in the county serving two-year terms.[283] The constitution reinstated the jurisdiction of the probate court as "jurisdiction in all matters testamentary and of administration in orphans' business and the allotment of dower, in cases of idiocy and lunacy, and of persons *non compos mentis*."[284] This definition delegated jurisdiction to legislative control to the extent legislation established rights and duties of executors and administrators.[285] Legislation establishing the probate courts incorporated the constitution's definition of jurisdiction by reference: "with such jurisdiction to said courts within their respective counties as is prescribed to them in the aforesaid article of the constitution."[286] Subsequent legislation conferred upon the probate courts all jurisdiction previously exercised by county courts and probate courts,[287] but some of this jurisdictional grant was unconstitutional.[288] Appeals lay to the High Court of Errors and Appeals.[289] The chancellor did not have

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[283] MISS. CONST. of 1832, art. IV, § 18.

[284] *Id.*

[285] *See* Servis v. Beatty, 32 Miss. 52, 86-87 (1856) (discussing scope of jurisdiction).

[286] Act to Carry into Effect that Part of the Fourth Article of the Constitution Which Provides for the Establishment of a Court of Probates in the Several Counties in this State § 1, Jan. 1833 Miss. Laws 136, LAWS MISS. 1824-38, *supra* note 90, at 444. Cases pending in either the old county court or the old probate or orphans' court were transferred to the new probate court. *Id.* § 11, Jan. 1833 Miss. Laws 139, LAWS MISS. 1824-38, *supra* note 90, at 446.

[287] Act to Amend an Act to Carry into Effect that Part of the Fourth Article of the Constitution Which Provides for the Establishment of a Court of Probates §§ 1-2, Dec. 1833 Miss. Laws 28-29, LAWS MISS. 1824-38, *supra* note 90, at 507.

[288] In Smith v. Craig, 18 Miss. (10 S. & M.) 447, 452 (1848), a party brought a suit to partition a joint estate in probate court, such power previously being vested in county courts. The high court affirmed the probate court's dismissal for lack of jurisdiction, observing that, though a probate "judge" might receive such jurisdiction, the probate court could not because of its limited jurisdiction under the constitution. The opinion also observed that the party sought an equitable decree for relief and thus the case fell within exclusive chancery jurisdiction. *Smith*, 18 Miss. at 451.

[289] *E.g.*, Wooldridge v. Wilkins, 4 Miss. (3 Howard) 360, 360 (1839). Appeals were later held to exist as a matter of right under a writ of error from the High Court of Errors and Appeals to the probate courts. Green v. Whiting, 9 Miss. (1 S. & M.) 579, 583 (1844) (stating writ of error to high court was matter of right under acts of Feb. 10, 1830 and May 13, 1837).

authority to review probate proceedings,[290] and 1844 legislation expressly prohibited appeals to the chancellor and directed appeals to the High Court of Errors and Appeals.[291]

Although it could be problematic whether the probate courts had jurisdiction of a particular case,[292] on matters within their competence, their jurisdiction was exclusive.[293] They met monthly in most counties.[294]

Criminal Courts. Early experience with the crime problem led to the creation in 1836 of special inferior criminal courts in five counties.[295] The courts consisted of one judge in each of those counties, elected for a four-year term.[296] These courts had general "cognizance and jurisdiction, concurrent with the circuit courts of said counties over all crimes, misdemeanours, and offences of whatever nature . . . and shall hear and determine the same, in the same manner, and with the same effects that said circuit courts may, or can do. . . . "[297] Appeals lay di-

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[290] *See* Blanton v. King, 3 Miss. (2 Howard) 856, 861-62 (1838) (reversing chancellor who overruled demurrer to bill that sought to correct errors of probate court).

[291] Act to Amend an Act Entitled "Act to Carry into Effect . . . " § 1, 1844 Miss. Laws 95. Even prior to the Act, the court held that decrees within the probate court's jurisdiction could not be challenged by proceedings in chancery court. Griffith's Adm'r v. Vertner, 6 Miss. (5 Howard) 736, 739, 741 (1841).

[292] *Compare* Gaskins v. Hammett, 32 Miss. 103 (1856) (holding probate court lacked jurisdiction over claim against administrator who denied capacity as administrator) *and* Clarke v. Ratcliffe, 8 Miss. (7 Howard) 162, 163 (1843) (finding no probate court jurisdiction to enforce attorney's lien on money recovered in that court) *with* McWillie v. Van Vacter, 35 Miss. 428, 445 (1858) (holding probate court had jurisdiction to determine property or contract claims when they arose in administration of estate even though it lacked jurisdiction to determine them directly). *Accord* Compton v. Compton, 14 Miss. (6 S. & M.) 194, 198 (1846).

[293] McWillie v. Van Vacter, 35 Miss. 428, 443 (1858); McRea v. Walker, 5 Miss. (4 Howard) 455, 457 (1840).

[294] Act to Authorize the Several Courts of Probate Therein Mentioned to Hold Their Courts Monthly § 1, 1838 Miss. Laws 333-35, LAWS MISS. 1824-38, *supra* note 90, at 895-96.

[295] The legislation was a constitutional exercise of the legislature's authority to establish inferior courts. Thomas v. State, 6 Miss. (5 Howard) 20, 28 (1840).

[296] Act to Establish in the Counties of Warren, Claiborne, Jefferson, Adams, and Wilkinson an Inferior Court of Criminal Jurisdiction § 2, 1836 Miss. Laws 25, LAWS MISS. 1824-38, *supra* note 90, at 547.

[297] *Id.* § 8, 1836 Miss. Laws at 27-28, LAWS MISS. 1824-38, *supra* note 90, at 549. In addition to original jurisdiction, the criminal court also summoned the

rectly to the High Court of Errors and Appeals,[298] but the criminal courts remained inferior courts, subject to the supervisory jurisdiction of the circuit courts, and circuit courts could review proceedings in criminal court by certiorari.[299] The courts duplicated so closely the criminal work of the circuit courts that they were probably unnecessary. Accordingly, the legislature abolished the criminal courts in 1840 and returned their cases to the circuit courts.[300]

Two decades later, in 1860, another inferior court of criminal jurisdiction, called the Criminal Court, was established for Warren county. Consisting of one judge elected for a four-year term,[301] the court had general criminal jurisdiction concurrent with the circuit court,[302] including the power to issue writs of habeas corpus and injunctions.[303] This criminal court followed

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grand jury. *Id.* § 16, 1836 Miss. Laws 31, LAWS MISS. 1824-38, *supra* note 90, at 551-52.

[298] Under the Act, "all the provisions in relation to appeals and writs of error in criminal cases in the circuit courts of this state, shall be applicable to said criminal courts." *Id.* § 20, 1836 Miss. Laws 32, LAWS MISS. 1824-38, *supra* note 90, at 552. And appeals in circuit court lay to the high court. Act to Organize and Establish Circuit Courts § 15, Jan. 1833 Miss. Laws 32-33, LAWS MISS. 1824-38, *supra* note 90, at 407. *See supra* note 203 and accompanying text.

[299] The language of the statute suggests that certiorari could, in fact, be employed to effect removal or interlocutory appeal of actions pending in criminal court:

> [W]henever it shall be made to appear to the satisfaction of the circuit court . . . that for any cause, injustice is likely to be done in any case depending in the court created by this act . . . the said circuit court shall award a certiorari to said criminal court, commanding such cause to be certified and sent into said circuit court, where it shall be proceeded on according to law.

Act to Establish an Inferior Court of Criminal Jurisdiction § 21, 1836 Miss. Laws 32-33, LAWS MISS. 1824-38, *supra* note 90, at 553.

[300] Act to Reorganize the Judicial Districts and to Abolish the Criminal Court § 4, 1840 Miss. Laws 37.

[301] Act to Establish in the County of Warren an Inferior Court of Criminal Jurisdiction §§ 1-2, 1859 Miss. Laws 181-82.

[302] The judge, in addition to being conservator of the peace, "shall have power to issue and order all writs and process relative to crimes and misdemeanors within the aforesaid county, as may be issued and ordered by the Judges of the circuit courts." *Id.* § 6, at 183.

[303] *Id.* § 12, at 184.

circuit court procedure,[304] and appeals (by writs of error and certiorari) lay directly to the High Court of Errors and Appeals.[305]

Boards of Police. The constitution created elected boards of police in each county, made up of five persons elected for two-year terms.[306] The constitution itself delegated to these boards jurisdiction over county business like roads, bridges, and elections;[307] it also designated them "conservators of the peace."[308] The legislature transferred to these boards the jurisdiction previously exercised by county courts, which included county court jurisdiction in enforcing the slave code.[309] Judging from subsequent legislation, however, much of the work of the boards (or courts) of police concerned taxation and supervision of finances of local officials—work much akin to today's Supervisors.[310] After 1846 the county boards of police acquired power to regulate the justice of the peace districts within their counties.[311]

Justices of the Peace. Districts in each county elected justices of the peace, who served two terms.[312] As before, limited

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[304] *Id.* § 8, at 183.

[305] *Id.* §§ 17, 18, at 186.

[306] MISS. CONST. of 1832, art. IV, § 20.

[307] *Id.*

[308] *Id.* § 22. Their designation as conservators of the peace does not indicate that their functions were primarily judicial. Later constitutions would vest conservator-of-the-peace jurisdiction in all "civil officers." *See* MISS. CONST. of 1868 art. VI, § 22, *in* REV. CODE MISS. 662 (1871).

[309] Act to Establish Boards of Police and Define Their Powers and Jurisdiction and for Other Purposes § 3, Jan. 1833 Miss. Laws 6, LAWS MISS. 1824-38, *supra* note 90, at 385. No explicit mention is made of the jurisdiction to try and punish slaves. But Boards of Police created Slave Patrols that were authorized to "administer up to 39 lashes with no judicial proceeding whatsoever." Christopher Waldrep, *Due Process for Slaves in Mississippi* 13 (1995) (unpublished typescript) (citing *Warren County Slave Patrol Rules and Regulations* (undated, in the Natchez Trace Collection at the University of Texas Libraries)).

[310] In fact, the executive function of the boards was so well established that when, during the Civil War, the legislature wanted to empower additional courts to enforce runaway slave laws, it selected the Probate judges and Probate and Circuit Court clerks. Act to Amend Article 16 § 1, Aug. 1864 Miss. Laws 33.

[311] 1846 Miss. Laws 244-45.

[312] *Id.*

criminal jurisdiction was assumed (but not specified) and civil jurisdiction was limited to fifty dollars.[313] The statutory grant of jurisdiction referred even more vaguely to "all the jurisdiction, power and authority given and allowed by law to Justices of the Peace, not contrary to the constitution of this state."[314] They later received limited power to punish contempt.[315] Decisions made initially by a justice of the peace could be appealed, or retried, before a justice of the peace and a jury.[316] Appeals to courts were guaranteed, but the legislature was authorized to regulate the procedure for such appeals,[317] and the legislature provided for appeals to lie to the circuit courts.[318]

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[313] "[T]he jurisdiction of justices of peace shall be limited to causes in which the principal of the amount of controversy shall not exceed fifty dollars. . . . " MISS. CONST. of 1832, art. IV, § 23. This language was intended to authorize justices of the peace to enter judgment over $50 that included interest on the principal debt or claim. *See* Planters' Bank v. Coulson, 7 Miss. (6 Howard) 395 (1842).

Notwithstanding a decision prior to the 1832 constitution that held that creditors could not separately enforce notes given in the same transaction in order to confer jurisdiction on a justice of the peace, *see supra* note 140, creditors continued to try to manipulate their claims to establish justice of the peace jurisdiction. *See* Scofield v. Pensons, 26 Miss. 402, 404 (1853) (holding creditor could not subdivide open account into claims under $50 in order to enforce before justice of peace), *overruled in part by* McLendon v. Pass, 66 Miss. 110, 111 (1888) (permitting plaintiff to split actions for consecutive annual farm leases and bring them separately before justice of peace where claims stated separate causes of action). On the other hand, a defendant could raise a setoff larger than the principal claim as long as the balance did not exceed the justice's jurisdictional amount. Glass v. Moss, 2 Miss. (1 Howard) 519, 520-21 (1837) (permitting $70 note to set off $40 debt).

[314] Act to Declare in Force the Several Acts Concerning the Mode of Election and Jurisdiction of Justices of the Peace in this State and for Other Purposes § 1, Jan. 1833 Miss. Laws 201-02, LAWS MISS. 1824-38, *supra* note 90, at 473.

[315] Criminal contempt was punishable by fines not to exceed fifty dollars or imprisonment no longer than two days. In order to compel compliance with court orders, the justice could impose a fine not to exceed fifty dollars or imprison until the order was complied with. 1858 Miss. Laws 218.

[316] We know this because the practice did not originally extend to Franklin County until the legislature imposed it. Act to Regulate Appeals Taken from the Decision of Justices of the Peace Within the County of Franklin § 1, 1840 Miss. Laws 41.

[317] MISS. CONST. of 1832, art. IV, § 23 ("In all causes tried by a justice of the peace, the right of appeal shall be secured under such rules and regulations as shall be prescribed by law.").

[318] Act to Declare in Force the Several Acts Concerning Justices of the Peace

Until 1854 slaves and free Afro-Americans were prosecuted upon indictment in circuit court.[319] But after 1854 all noncapital crimes committed by slaves and free Negroes were tried upon complaint to special courts composed of two justices and five slaveholders.[320]

Justices of the peace could also be elected in towns, when the legislation incorporating the towns so authorized.[321] But, the resulting merger of executive and judicial powers must have had undesirable results in some cases, for subsequent legislation sometimes retracted the grant of justice of the peace powers to mayors.[322] The justice of the peace residing in Ripley apparently did something to irritate an influential county resident, for special legislation limited that justice's powers to the town limits of Ripley.[323]

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§ 4, Jan. 1833 Miss. Laws 203, LAWS MISS. 1824-38, *supra* note 90, at 474 ("All appeals that have heretofore, by the now existing laws of this state, been taken to the county courts respectively, shall hereafter be taken to the circuit courts, under the laws now in force for the regulating appeals to said circuit courts . . . ."); Act to Authorize Appeals from the Decisions of Justices of the Peace to the Circuit Courts § 1, 1842 Miss. Laws 136; Act Amendatory of an Act to Authorize Appeals, 1846 Miss. Laws 232. The circuit court's jurisdiction on appeal and its process was limited to that of the justice of the peace. *See* Crapoo v. Town of Grand Gulf, 17 Miss. (9 S. & M.) 205, 206 (1848).

[319] *See* REV. CODE MISS. 166 (1840).

[320] Act Regulating the Prosecution and Trial of Slaves in this State for Crimes, the Punishment of Which is not Capital § 1, 1854 Miss. Laws 126 (codified as REV. CODE MISS. art. 68, at 250 (1856)). Capital offenses were still triable in circuit court. *Id.* art. 57, at 248.

[321] For example, the legislature authorized the town of Philadelphia to elect a justice of the peace and constable. It also directed that the justice of the peace be president of the selectmen for the town. Act to Incorporate the Town of Philadelphia §§ 2, 5, 1838 Miss. Laws 219.

[322] *E.g.*, Act to Amend an Act Entitled an Act to Incorporate the Town of Hernando § 2, 1842 Miss. Laws 237-38 (repealing broad grant of justice of peace powers to mayor of Hernando but preserving limited power to enforce violations of town by-laws).

[323] 1844 Miss. Laws 325-26. A second justice of the peace was specially authorized for Ripley in 1852. Oct. 1852 Miss. Laws 186-87. In 1856 the territory encompassing Ripley was authorized to elect three justices, but the justice of the peace elected from Ripley proper, now made president of the town selectmen, was authorized to decide civil cases only when both plaintiff and defendant resided within the town. 1856 Miss. Laws 179. In 1860, Ripley got back its second justice of the peace when the elected constable was given comparable jurisdiction. 1859

Mayor's Courts. Notwithstanding early problems with the mayor's court in Natchez,[324] a number of mayor's courts were established later in the century. For example, legislation incorporating Vicksburg required the mayor to hold Mayor's Court daily[325] and granted the court broad jurisdiction to issue writs returnable throughout the state that was concurrent with the jurisdiction of the circuit courts.[326] Appeals lay directly to the High Court of Errors and Appeals.[327] The Vicksburg Mayor's Court also exercised the criminal jurisdiction of a justice of the peace as well as additional criminal jurisdiction to arrest, fine, and punish with sentences of up to six weeks in the city work house.[328] This court must have proved effective, for subsequent legislation established a new mayor's court for Natchez with powers within the city concurrent with the justice of the peace and jurisdiction over all claims rising under city ordinances or by-laws.[329] The Mayor of Natchez also enjoyed jurisdiction to punish contempt with fines of up to ten dollars or imprisonment "for any time not exceeding twenty-four hours."[330] The legislation provided that cases could be appealed from the Mayor's Court in Natchez to the Circuit Court, much as proceedings were appealed from a justice of the peace.[331] But judgments from the Mayor's Court in Jackson[332] were directly appealable to the High Court of Errors and Appeals, provided that the amount was for more than thirty dollars.[333] In 1854 all mayors of incorporated towns,

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Miss. Laws 196.

[324] *See supra* text accompanying notes 45-47.

[325] Act to Incorporate the City of Vicksburg § 40, 1839 Miss. Laws 327.

[326] *Id.* at 328.

[327] *Id.* § 41, at 328-29.

[328] *Id.* These sentences were imposed on persons who committed simple assaults, breaches of the peace, or otherwise violated city ordinances. *Id.*

[329] Act for Establishing and Defining the Judicial Powers of the Mayor of the City of Natchez § 1, Oct. 1852 Miss. Laws 191-92.

[330] *Id.* § 2, at 192.

[331] *Id.* § 4, at 192-93.

[332] Act to Amend the Charter of the City of Jackson § 1, Mar. 1861 Miss. Laws 55.

[333] Act Supplemental to "Act to Amend the Charter of the City of Jackson" § 1, Mar. 1861 Miss. Laws 71.

who were ex-officio justices of the peace, were authorized to issue attachments.[334] Further, legislation incorporating other towns and cities regularly gave the mayors powers of justice of peace.[335]

Courts Martial. Under the constitution of 1832, the legislature continued to control the organization and discipline of the militia.[336] Despite the growth of the state, the militia was still formed into four divisions in 1832, with each division divided into two brigades.[337] But in 1837 the militia was reorganized into five divisions; each division into two brigades; and each brigade into regiments. Regiments were divided into battalions and companies.[338] Company courts martial, composed of the captain and two officers (or substitute noncommissioned officers), were to meet every muster day.[339] The detailed provisions of old statutes that established the superior courts martial and regulated their procedure were adopted by refer-

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In 1865 decisions of mayors in Jackson, Vicksburg, and Natchez were made appealable to the board of aldermen, which conducted trials de novo. *See* Act to Amend the Charters of the Cities of Jackson, Natchez and Vicksburg § 2, 1865 Miss. Laws 322.

[334] Act to Amend the Several Attachment Laws of this State § 6, 1854 Miss. Laws 90-91.

[335] There was much variation in the details. *E.g.*, Act to Incorporate the Town of Forrest § 5, 1865 Miss. Laws 382-83 (mayor and aldermen authorized to punish violation of ordinances with fines up to 25 dollars); Act to Revive an Act to Incorporate the City of Meridian § 2 1865 Miss. Laws 397 (providing that mayor was ex officio justice of peace); Act Incorporating the Town of Friar's Point § 4, 1865 Miss. Laws 422 (making justice of peace mayor and empowering mayor and aldermen to punish violations of ordinances with fines up to $50); Act to Incorporate the Town of Hernando § 6, 1866 Miss. Laws 47 (mayor's court justice court for DeSoto county).

[336] MISS. CONST. of 1832, Militia, § 1.

[337] Act to Provide for the Organization and Discipline of the Militia of this state, State § 1, Dec. 1833 Miss. Laws 15, LAWS MISS. 1824-38, *supra* note 90, at 487.

[338] *See* Act to Regulate the Militia of this title 1 §§ 1-4, 1837 Miss. Laws 46-50, LAWS MISS. 1824-38, *supra* note 90, at 604-07. Moreover, counties were sometimes divided into two regiments. *See* Act to Divide the Militia of Itawamba, Panola, and Yallobusha Counties into Two Regiments Each § 1, 1841 Miss. Laws 142.

[339] Act to Provide for the Organization and Discipline of the Militia of this State § 20, Dec. 1833 Miss. Laws 14, LAWS MISS. 1824-38, *supra* note 90, at 494-95.

ence,[340] and the duties of the brigade and regimental judge advocates continued as before.[341]

The 1837 Act consolidated and restated the basic law and procedures. In addition to courts martial at the company, regiment, and brigade level, the Act authorized the governor or commanding officers of a brigade or division to institute special courts of inquiry "for the purpose of investigating the conduct of any officer . . . ."[342] The special courts sat as preliminary tribunals; consisting of between three and five officers, they reported to the person who instituted them who could then appoint a court martial.[343] Otherwise, the jurisdiction of the courts martial were largely unaffected by several waves of legislation. During the Civil War, the distinct compositions of company, regimental, brigade and special courts martial were preserved.[344] (Legislation later provided that "general courts martial may consist of three commissioned officers and a judge advocate."[345]) The punishments were still limited to cashiering or fining officers and noncommissioned officers, but penalties for soldiers who resisted the draft ominously included "all the penalties to which a deserter of the Confederate States, or this State, is subject."[346]

IV. Courts During and After the Civil War

Even before Lincoln's election, Mississippi's statesmen had expressed alarm about the growth of abolitionist sentiment in the country and about the possible admission of enough free states—in the distant future—to ratify a constitutional

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[340] *Id.* §§ 32, 43, Dec. 1833 Miss. Laws 17-18, Laws Miss. 1824-38, *supra* note 90, at 496, 498.

[341] The old statutes were adopted by reference. *Id.* § 31, Dec. 1833 Miss. Laws 15, Laws Miss. 1824-38, *supra* note 90, at 496.

[342] Act to Regulate the Militia of this State, title 9, art. 4, § 23, 1837 Miss. Laws 86, Laws Miss. 1824-38, *supra* note 90, at 634.

[343] *Id.*, title 9, art. 4, § 24, 1837 Miss. Laws 86, Laws Miss. 1824-38, *supra* note 90, at 634.

[344] *See* Of Courts-Martial and Courts of Inquiry, 1862 Miss. Laws 177-85.

[345] Act to Amend the Militia Law of this State § 2, Feb.-Mar. 1865 Miss. Laws 22.

[346] *Id.* 1862 Miss. Laws 188.

amendment abolishing slavery. L.Q.C. Lamar had gone so far as to suggest an amendment that would have guaranteed forever the right of slave owners to own slaves.[347] In 1860 the Mississippi legislature declared in favor of secession, explicitly identifying as grounds the northern interference with slave owners' rights.[348] In 1861 the legislature ratified the confederate constitution.[349] The confederate constitution generally copied the United States Constitution, but differed in establishing slavery on all confederate territory, guaranteeing slave owners' rights, and obligating confederate states to recognize slavery.[350]

Although the confederate constitution contained an article that duplicated United States Constitution's provisions for a federal judiciary,[351] the confederate supreme court was never established. The Mississippi legislature viewed the confederate courts as occupying the same place—literally—that the federal courts had, for a statute authorized the confederate trial court to use the offices in the Jackson City Hall previously used by the federal court.[352] The confederate trial court for Mississippi never met.[353]

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[347] *See generally* Michael H. Hoffheimer, *L.Q.C. Lamar 1825-1893*, 63 MISS. L.J. 5, 11 n.15 (1993).

[348] *See* Resolutions of the Legislature of the State of Mississippi Declaring Secession to Be the Proper Remedy for the Southern States, Feb. 1860 Miss. Laws 566.

[349] An Ordinance to Adopt and Ratify the Constitution § 1, *in* Journal of the State Convention, and Ordinance and Resolutions Adopted in March, 1861, at 78 (1861).

[350] CONST. OF THE CONFEDERATE STATES art. IV, §§ 2(1), 3(3). *See generally* Michael H. Hoffheimer, *Copying Constitutional Text: Natural Law, Constitutionalism, Authority*, S. CAL. L. REV. (1994) [forthcoming].

[351] CONST. OF THE CONFEDERATE STATES art. III.

[352] Act to Provide for the Accommodation of the Courts of the Confederate States § 1, 1862 Miss. Laws 275-76.

[353] Judge S.J. Gholson, a United States judge for the district of Mississippi, resigned. The proceedings of the 1861 convention record: "Mr. Gholson read to the Convention his letter to the President of the United States, resigning his position as Judge of the Federal Courts for Mississippi." Journal of the State Convention and Ordinances and Resolutions adopted in January 1861, at 18. Gholson played an active role in the convention and became speaker of the House in 1865. ROWLAND, *supra* note 22, at 116. But unlike most of the federal judges who re-

Because there had been no appeals from Mississippi state courts to the Supreme Court prior to the Civil War, the attempted secession (and resulting elimination of superior federal court jurisdiction) had little effect on legal practice in state courts. More relevant was the fact that Mississippi itself suspended much civil litigation by staying most civil actions pending the war: "[A]ll laws for the collection of debts and liabilities, on bonds, promissory notes, bills of exchange, open accounts, or contracts for the payment of money, are hereby suspended until twelve months after the close of the present war. . . . "[354] In 1865 the legislature voted—over the governor's veto—to extend to 1868 this moratorium on most civil litigation.[355] But the first published opinion of the high court in 1866 ruled this wartime suspension of enforcement of the state civil laws unconstitutional.[356]

The High Court of Errors and Appeals ceased functioning for most of the war[357]—at least it published no opinions be-

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signed, he was not appointed a confederate judge. Garner writes that Clayton was appointed confederate judge for the Mississippi district but probably never held court. *See generally* JAMES W. GARNER, RECONSTRUCTION IN MISSISSIPPI 6, 40 (1968).

[354] Act to Modify the Collection Laws of this State § 1, Jul. 1861 Miss. Laws 74. Garner remarks that "an act of the legislature in 1861 . . . practically closed [the lower courts] so far as civil business was concerned . . . . [A]nd as a no[t] inconsiderable number of the criminal cases were settled by the military authorities, it is reasonable to suppose that the business of the courts was nominal." Garner, *supra* note 351, at 40-41. But the Act did not stay actions that were pending in the courts, and it did not apply by its terms to many civil actions. Consequently, one must look to social, economic, and political explanations for the elimination of civil judicial business, rather than to the statute.

[355] Act to Modify the Collection Laws of this State § 1, Oct. 1865 Miss. Laws 236.

[356] Coffman v. Bank of Kentucky, 40 Miss. 29, 37-39 (1866) (holding that legislation staying contract actions was unconstitutional violation of right of access to courts). Although the legislature had some power to suspend laws generally, the court held that "it has no power to suspend the rights of person and of property guarantied to the citizen in the declaration of rights, and required by the constitution to be enforced at stated times; for that would be to *suspend the constitution*." *Coffman*, 40 Miss. at 38.

[357] This is Garner's conclusion, Garner, *supra* note 351, at 40, but it is based, I think, on the lack of published cases, and it is possible that the court decided cases without publishing its opinions.

tween the October 1861 term and the April 1863 term, and none for 1865. It published only a handful of opinions for either civil or criminal cases between 1861 and 1866. But during the war, the Mississippi legislature resisted one of the more controversial acts of the confederate congress, protesting the confederate suspension of habeas corpus, and questioning the constitutionality of the Act.[358] In fact, the state adopted legislation the next year that strengthened the protections available under the writ.[359]

There was little formal change to the legal organization of the court system during the war: the local courts simply ceased to function. While this resulted in a privileging of possession and self-help that may have satisfied most private needs, slaveholders required a public, legal response to the dramatic increase in slave escapes.[360] Accordingly, legislation authorized probate court judges and even clerks of circuit and probate courts to try fugitive slaves.[361]

The years that followed the war—and prior to Reconstruction—witnessed some of the most radical changes to the state's judicial system. The Constitutional Convention of August 1865, from which blacks were excluded, amended the Constitution of 1832 to delete references to slavery and inserted a provision acknowledging the "destruction" of slavery.[362] The convention preserved the judicial system intact. The courts themselves held that neither secession, nor war, nor military occupation altered the effect of the laws or the jurisdiction of

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[358] Resolutions of the Legislature of the State of Mississippi in Relation to the Recent Act of the Congress of the Confederate States, Apr. 1864 Miss. Laws 91-93.

[359] Feb.-Mar. 1865 Miss. Laws 12-13.

[360] "Slaves fled from their owners as Union armies approached. Some 17,000 Mississippi blacks joined the Union forces." SKATES, *supra* note 14, at 107.

[361] Act to Amend Article 16 § 1, Aug. 1864 Miss. Laws 33.

[362] MISS. CONST. of 1832 art. VIII (amended 1865) ("The institution of slavery having been destroyed in the State of Mississippi, neither slavery or involuntary servitude otherwise than in the punishment of crimes . . . shall hereafter exist in this State. . . . "). For the text of the amended constitution, see 1865 Miss. Laws 43-44. *See* ORDINANCES, RESOLUTIONS, AND CONSTITUTIONAL AMENDMENTS, ADOPTED BY THE MISSISSIPPI CONSTITUTIONAL CONVENTION 1865 (1865).

state courts to enforce them. The issue was posed, perhaps most directly, by a defense to a prosecution for a crime prosecuted under an indictment dated May 30, 1865. The defendant argued that the state ceased to have legal status as a result of secession and that, accordingly, it could not prosecute violations of criminal statutes during that period. The high court rejected the defense:

> We entertain no doubt that the laws of the States, civil and criminal, as they stood at the date of the secession ordinance, continued in force afterwards, precisely as before, unaffected by that ordinance, or by the war, or by the deposition of the State magistrates in the month of May, 1865, or their restoration in the fall of that year; and that offences against the criminal laws, committed during the war, or during the occupation of the State by the army of the United States, are now liable to indictment and punishment as if these events had never occurred. The laws themselves were not suspended during the administration of General Canby and Provisional Governor Sharkey, but only their administration was temporarily obstructed.[363]

Among the emergency measures taken by the governor was the establishment of special courts of equity with jurisdiction to enforce all contracts for cotton sales.[364] On appeal to the High Court of Errors and Appeals, this special court's jurisdiction was not repudiated outright but was limited by construction.[365]

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[363] Harlan v. State, 41 Miss. 566, 569 (1867). In a similar fashion the court held that executed contracts for the sale of slaves were enforceable. Bradford v. Jenkins, 41 Miss. 328, 337 (1867). *See generally* Andrew Kull, *The Enforceability after Emancipation of Debts Contracted for the Purchase of Slaves*, 70 CHI.-KENT L. REV. 493, 494-95 (1994).

[364] Governor Sharkey's Proclamation of July 12, 1865, was never enacted and so appears in no compilation of the state's laws. But legislation did tacitly recognize the courts in 1866 when, due to a death in office, the legislature transferred cases pending in one of the special courts to the circuit court of Monroe County. Act Authorizing and Requiring the Transfer of the Business of the Special Court of Equity Established for the 9th Judicial District, 1866 Miss. Laws 91.

[365] An action was brought in the special court of equity by a principal against an agent who had violated directions to purchase cotton for the principal. Tharp

County Courts. In 1865 the legislature created a new system of inferior County Courts. The historical studies of Mississippi make scant reference to these county courts. It seems fair to assume that they were created, in part, to replace the slave courts and to institutionalize control of the Afro-American population. First composed of the probate judge and two justices of the peace,[366] the courts were soon composed of the probate judge alone.[367] The county courts had broad civil jurisdiction, including exclusive jurisdiction over forcible entry and detainer actions,[368] unlimited replevin power,[369] and jurisdiction over "civil suits of every description at law and equity, when the principal of the same, or the amount of damage, or the value of property or thing shall not exceed two hundred and fifty dollars."[370] Appeals lay directly to the circuit court.[371]

These county courts also received criminal jurisdiction concurrent with circuit courts over misdemeanors,[372] power

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v. Marsh, 40 Miss. 158, 161 (1866). The agent demurred to the special court's jurisdiction on the theory that an obligation to purchase cotton for a principal was not a contract "for cotton." *Tharp*, 40 Miss. at 160. The special court overruled the demurrer, but the high court reversed. *Id.*

[366] An Act to Establish County Courts § 10, 1865 Miss. Laws 71.

[367] Act to Amend the Act Entitled "Act to Establish County Courts" § 1, 1867 Miss. Laws 1.

[368] An Act to Establish County Courts, § 23, 1865 Miss. Laws 77.

[369] *Id.* § 24, at 78.

[370] *Id.*

[371] *Id.*

[372] The jurisdictional grant included a long list of offenses and "all other common law and statutory offences below the grade of felony . . . and all attempts to commit any of those offences." *Id.* § 3, at 68.

Notwithstanding statutory language giving the county courts "full and complete jurisdiction" over certain cases, the high court held that the circuit court retained concurrent jurisdiction in a prosecution for a misdemeanor. *Harlan*, 41 Miss. at 570. The court stated that:

> Upon a careful consideration of the statute, we are satisfied that, although the county court is invested with "full and complete jurisdiction" over the cases enumerated, yet it was not intended that its criminal jurisdiction should exclude that of the Circuit Court over the same offences. The Circuit Court already possessed the jurisdiction; and the fact that the same jurisdiction has been since bestowed upon another tribunal, will not have the effect to deprive the Circuit Court of its juris-

like the circuit court to punish contempt,[373] and power to issue writs of habeas corpus.[374] Though courts of record,[375] criminal prosecutions before these courts dispensed with the need for grand jury indictment.[376] The district attorney was not required to prosecute,[377] and judges served as prosecutors when the district attorney did not appear.[378]

Authorized to inflict punishment by torture,[379] appeals on the record[380] were permitted to the circuit court only if the defendant waived a jury, because cases tried to a jury were not appealable.[381] Other procedural irregularities included the abolition of property requirements for jurors[382] and the elimination of peremptory challenges.[383] The county courts also assumed the appellate role previously played by circuit courts and exercised supervisory jurisdiction over proceedings before mayor's courts and justices of the peace.[384]

Justices of the Peace. Justices of the Peace were given concurrent criminal jurisdiction with county courts in cases of simple assault and certain other misdemeanors.[385]

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diction, without some negative words indicating plainly such an intention.

Id.

[373] An Act to Establish County Courts § 18, 1865 Miss. Laws 75.

[374] *Id.* § 12, at 73.

[375] *Id.* § 2, at 67.

[376] *Id.* § 1, at 66.

[377] *Id.*

[378] An Act to Establish County Courts § 14, 1865 Miss. Laws 73.

[379] In addition to punishments authorized by statute, these county courts were authorized to inflict corporal punishment by hanging the convict by his or her thumbs for two hours every day for up to ten days, or by starving the convict. *Id.* § 3, at 68.

[380] It was held error for the circuit court to try an appeal de novo from county court. Lyles v. Barnes, 40 Miss. 608, 611 (1866).

[381] Act to Establish County Courts § 19, 1865 Miss. Laws 75. Appeals were later authorized also to the Criminal Court in Warren County. Act to Authorize Appeals § 1, 1865 Miss. Laws 203-04.

[382] An Act to Establish County Courts § 13, 1865 Miss. Laws 73.

[383] *Id.* § 14, at 73.

[384] *Id.* § 25, at 79.

[385] Act to Amend the Act Entitled Act to Establish County Courts § 7, 1866-67 Miss. Laws 3-4.

Probate Courts. The great expansion of jurisdiction of probate judges that occurred with their designation as county courts was followed by legislation that granted probate courts power to issue injunctions, writs of habeas corpus, "and all other remedial writs allowed by law."[386]

Military Courts. As part of legislation reorganizing the militia in 1865, the legislature established general, divisional, brigade, and regimental courts martial with separate composition and with right to an appeal.[387] In 1867 the Act was suspended, unless revived by the governor.[388]

EPILOGUE

The constitution of 1868 departed from the preceding system in providing for gubernatorial appointment of judges, except justices of the peace. It established the basic court system that has endured to the present composed of a supreme court with appellate jurisdiction,[389] circuit courts of general jurisdiction,[390] chancery courts with equity and probate jurisdiction,[391] justices of the peace with limited criminal and civil jurisdiction,[392] and other inferior courts established by the legislature.[393] The constitution of 1890 restored the election of

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[386] Act to Authorize Judges of the Probate Courts in this State to Grant Injunctions §§ 1, 2, 1867 Miss. Laws 425.

[387] Act to Reorganize the Militia of the State, arts. 95-101, § 12, Oct. 1865 Miss. Laws 120-22.

[388] Act to Suspend an Act Entitled an Act to Reorganize the Militia § 1, 1867 Miss. Laws 231.

[389] MISS. CONST. of 1868, art. VI, § 4 (providing for "no jurisdiction but such as properly belongs to a supreme court").

[390] *Id.* § 14 (conferring "original jurisdiction in all matters, civil and criminal, within this state, but in civil cases, only when the principal amount in controversy exceeds one hundred and fifty dollars").

[391] *Id.* § 16 (conferring "full jurisdiction in all matters of equity, and of divorce and alimony; in matters testamentary, and of administration; in minors' business, and allotment of dower, and in cases of idiocy, lunacy, and persons *non compos mentis*").

[392] *Id.* § 23 ("The jurisdiction of justices of the peace shall be limited to causes in which the principal of the amount in controversy shall not exceed the sum of one hundred and fifty dollars.").

[393] *Id.* § 24 ("The Legislature shall, from time to time, establish such other inferior courts as may be necessary, and abolish the same whenever they shall

judges but nevertheless retained the basic jurisdictional structure established in 1868.[394]

The immediate historical context for the 1868 reforms was not, however, the memory of legal institutions that had ceased (for purely local reasons) in 1832, but rather the recent experience of the failure of the justice system due to the virtual shutdown of the local courts from 1861 to 1865, the rogue county courts from 1865 to 1868, and the press of Reconstruction politics. For the courts the most important results of the 1868 constitution were: (1) the elimination of county courts;[395] (2) the elimination of probate courts and the amalgamation of probate and equity jurisdiction in a separate court of chancery; and (3) the elimination of concurrent equity jurisdiction in the circuit courts.

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deem it expedient.").

[394] There were some changes in language that resulted in some small adjustments to jurisdiction. MISS. CONST. of 1890, art. VI, § 146 (providing that "supreme court shall have such jurisdiction as properly belongs to a court of appeals"); *id.* § 156. (providing that "circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law"); *id.* § 159 (stating "chancery court shall have full jurisdiction in the following matters and cases, viz.: (a) All matters in equity. (b) Divorce and alimony. (c) Matters testamentary and of administration. (d) Minor's business. (e) Cases of idiocy, lunacy, and persons of unsound mind . . . ."); *id.* § 171 (providing that "jurisdiction of justices of the peace shall extend to causes in which the principal amount in controversy shall not exceed the sum of two hundred dollars").

The Constitution of 1890 also eliminated some of the problems that arose because of the difficulty in distinguishing between legal and equitable jurisdiction in some cases. The chancery court received explicit jurisdiction to grant complete relief in land title actions even if a legal remedy existed, *id.* § 160, and also received jurisdiction concurrent with the circuit court in certain actions involving fiduciaries and accounting, MISS. CONST. of 1890, art. VI, § 161. Moreover, the supreme court was prevented from reversing judgments or decrees from circuit or chancery court where the only error or mistake was that the cause was of equity or common-law jurisdiction. *Id.* § 147.

[395] The constitution itself did not eliminate county courts. The legislature abolished them and transferred pending cases to circuit courts. Act to Abolish County Courts §§ 1-2, 1870 Miss. Laws 83-84.

RECENT DECISIONS

MEDICAL MALPRACTICE—JURY INSTRUCTIONS—"MERE ERROR OF JUDGMENT" LANGUAGE IS NO LONGER APPROPRIATE IN MEDICAL MALPRACTICE JURY INSTRUCTIONS*

On November 24, 1986, Charles M. Day, Jr. underwent a medical procedure where Dr. Doyle A. Morrison surgically implanted an inflatable penile prosthesis in order to correct a sexual dysfunction.[1] Over the next two and one-half months, Day experienced problems when he inflated the device.[2] After several consultations with other physicians concerning problems with the prosthesis, Day underwent a second operation.[3] Because Day's second operation was unsuccessful,[4] he visited

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* Best Case Note Award. Presented by the law firm of Ott & Purdy, Jackson, Mississippi.

[1] Day v. Morrison, 657 So. 2d 808, 809-10 (Miss. 1995). Day experienced sexually related complications, primarily impotence. *Day*, 657 So. 2d at 809.

[2] *Day*, 657 So. 2d at 810. Day claimed that he could not inflate the prosthesis during several post-operative office visits because the device caused pain when inflated. *Id.* Day told Dr. Morrison that he thought the prostheses were "crossed over." *Id.* On December 26, 1986, Dr. Morrison noted that he believed the prosthesis rested properly in the left corpora. *Id.* On January 9, 1987, Dr. Morrison found that the left corpora cavernosa felt "devoid of the penile prosthesis" and ordered x-rays to determine if the device "had fallen back." *Id.*

[3] *Id.* at 810-11. On January 12, 1987, Dr. Morrison referred Day to Dr. Richard Pearson for a second evaluation because he was not sure if the left cylinder of the prosthesis rested in the proper position. *Id.* at 810. Dr. Pearson indicated that the cylinders were more to the right side of the penis than the left side and that Day would need an additional surgery to reposition the cylinders. *Id.* In March of 1987, Day's brother, also a doctor, suggested he visit Dr. Larry Weems. *Id.* at 811. On May 12 and 13, 1987, Dr. Weems removed and reinserted the original prosthesis. *Day*, 657 So. 2d at 811.

[4] *Id.* By July of 1987, subsequent to Dr. Weems' operation, the right cylinder

another doctor who ultimately removed the device.[5]

On March 22, 1989, Charles M. Day, Jr. and his wife, Elizabeth Ann Day, filed a medical negligence action against Dr. Morrison.[6] The lower court returned a verdict in favor of Dr. Morrison.[7] On Petition for Rehearing, the Mississippi Supreme Court held: Reversed and remanded.[8] The Mississippi Supreme Court held that in a medical malpractice case jury instructions should not include the phrases "mere error of judgment," "good faith error in judgment," or "honest error in judgment" because such language may potentially confuse a jury.[9]

I. RELATED LAW

The area of medical malpractice evolved as a form of common law negligence.[10] In order for a patient to prevail in a medical malpractice action, he had to establish that the defendant breached the applicable standard of care.[11] Historically,

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of the prosthesis would not inflate, and Day lost the desire to have sexual intercourse due to pain. *Id.*

[5] *Id.* Dr. Weems referred Day to Dr. William Furlow. *Id.* After Dr. Furlow determined that the right cylinder of the prosthesis would not inflate, he performed a third operation on Day to correct the crossover problem Weems had encountered. *Id.* Because Day developed an infection, Dr. Furlow removed the prosthesis entirely. *Id.* Dr. Furlow testified that cylinder crossover occurred when the cylinders were defective and that such a problem was identifiable intra-operatively. *Day*, 657 So. 2d at 811.

[6] *Id.* at 809. The Days sought damages for complications arising from the initial penile implant surgery performed by Dr. Morrison on November 24, 1986. *Id.*

[7] *Day*, 657 So. 2d at 809. The jury concluded that Dr. Morrison performed the operation in a manner consistent with a minimum level of surgical competence. *Id.*

[8] *Id.* at 815. The Mississippi Supreme Court reversed and remanded the case for a new trial because the lower court improperly instructed the jury. *Id.*

[9] *Id.* The court stated that the two jury instructions were confusing because they could lead a jury to believe that a doctor would not incur liability for making an "error in judgment" even if he performed negligently. *Id.*

[10] Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193, 1196. Today medical malpractice is considered a distinct form of negligence occurring when a professional fails to exercise the degree of care and skill that other professionals exercise under similar conditions and circumstances. 61 AM. JUR. 2D *Physicians & Surgeons* § 205 (1981).

[11] Neil J. Squillante, Comment, *Expanding the Potential Tort Liability of Phy-*

the standard of care imposed on physicians has varied dramatically, beginning with res ipsa loquiter and culminating with the national standard of care.[12]

A. Res Ipsa Loquitur and Medical Malpractice

The Mississippi Supreme Court first discussed the standard of res ipsa loquitur in the context of medical malpractice in *Waddle v. Sutherland*.[13] In *Waddle*, the patient alleged that the physician negligently used an X-ray machine in treating his ailments.[14] The lower court instructed the jury to consider only the expert testimony in determining whether the physician administered the treatment with the care and skill of a competent physician.[15] The court also submitted to the jury two instructions[16] which embodied the doctrine of res ipsa loquitur.[17] The patient appealed, contending that the

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sicians: A Legal Portrait of "Nontraditional Patients" and Proposals for Change, 40 UCLA L. REV. 1617, 1625-26 (1993). In order to recover under a theory of negligence, the plaintiff must prove duty, breach, causation, and damages. *Id.* at 1626. The patient must prove that the physician's actions breached customary practice. Silver, *supra* note 10, at 1194.

[12] *See, e.g.*, Harris v. Shields, 568 So. 2d 269, 273 (Miss. 1990) (using mere error of judgment language); Trapp v. Cayson, 471 So. 2d 375, 380 (Miss. 1985) (imposing national standard of care); DeLaughter v. Womack, 164 So. 2d 762, 766 (Miss. 1964) (applying locality rule); Sanders v. Smith, 27 So. 2d 889, 893 (Miss. 1946) (discussing res ipsa loquitur doctrine).

[13] 126 So. 201, 202-03 (Miss. 1930).

[14] *Waddle*, 126 So. at 201. To treat the patient's eczema, the physician used an approved X-ray treatment. *Id.* at 202. After many treatments, sores appeared on the patient's legs; as a result, the physician had to amputate both legs. *Id.* The patient sued for damages, claiming that the physician's negligent use of the X-ray treatment proximately caused the loss of his legs. *Id.* at 201.

[15] *Id.* at 202. The court told the jury to find for the physician if the expert testimony indicated that the physician's X-ray treatment "was proper and done in the usual and ordinary manner" of a competent physician. *Id.*; *see* Prewett v. Philpot, 107 So. 880, 880 (Miss. 1926) (citing Saucier v. Ross, 73 So. 49, 50 (Miss. 1916)) (requiring that physician use reasonable care to avoid introduction of "foreign matter" during operation).

[16] *Waddle*, 126 So. at 202. The court instructed the jury to consider whether the X-ray treatment proximately caused the patient's injuries and whether reasonable care in the manner of treatment would have avoided such injuries. *Id.*

[17] *Id.* at 203. The Mississippi Supreme Court acknowledged the varied application of the doctrine of res ipsa loquitur in other jurisdictions. *Id.* While the court

lower court erred in instructing the jury.[18] On appeal, the Mississippi Supreme Court concluded that the jury could not construe the three instructions in harmony.[19] The court determined that the expert testimony instruction was controlling and misleading because it excluded material evidence and conflicted with the res ipsa loquitur instructions.[20] Thus, the court held that the instruction was erroneous.[21]

B. Adoption of the Locality Rule in Mississippi

Early on, Mississippi courts acknowledged that a physician would incur liability if he failed to exercise the level of skill and care prevailing among those in his profession.[22] The

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stated that the general rule in tort was that "mere proof" raised no presumption of negligence, the court recognized factual settings where the doctrine of res ipsa loquitur applied. *Id.* According to the court, a res ipsa case was one in which the circumstances surrounding the injury allowed no reasonable inference other than concluding that the physician's negligence caused the injury. *Id.*; *see* Sanders v. Smith, 27 So. 2d 889, 893 (Miss. 1946) (stating that res ipsa loquitur instruction test was whether or not, in process of operation, extraneous interventions beyond ordinary scope and routine procedure occurred, which if unexplained, would allow the average person to draw no other conclusion than that the physician performed negligently).

The court found that the doctrine of res ipsa loquitur applied to the facts of *Waddle*. *Waddle*, 126 So. at 203. *But see* Latham v. Hayes, 495 So. 2d 453, 458 (Miss. 1986) (holding res ipsa loquitur requirements not met and doctrine thus, inapplicable); Ross v. Hodges, 234 So. 2d 905, 908 (Miss. 1970) (finding res ipsa loquitur instruction inappropriate where jury had sufficient facts before it to determine whether physician acted negligently).

[18] *Waddle*, 126 So. at 202. The patient claimed that the expert testimony instruction prevented the jury from considering the material evidence presented by the patient and his wife. *Id.*

[19] *Id.* at 203. According to the court, the jury should construe all jury instructions so as to "modify and add to each other." *Id.* If one instruction conflicts with another instruction by precluding the jury from considering material evidence, the court will hold it to be misleading. *Id.*

[20] *Id.* The court noted that the expert testimony instruction might be correct when nonexpert testimony had no bearing on the issues. *Id.*

[21] *Id.* Recognizing that the instant case depended on nonexpert testimony as well as expert testimony, the court held the instruction erroneous and misleading. *Id.*

[22] Sanders v. Smith, 27 So. 2d 889, 891 (Miss. 1946). The standard required the exercise of the same skill, care, and diligence that other physicians in good-standing in the community provided in similar cases. 41 AM. JUR. *Physicians &*

Mississippi Supreme Court addressed several important issues in medical malpractice law in *Copeland v. Robertson*.[23] In *Copeland*, the Mississippi Supreme Court adopted the locality rule and defined the physician's standard of care in the context of that rule.[24] The plaintiff in *Copeland* filed a medical malpractice action against her physician for his alleged negligence in performing a surgical procedure without her consent.[25] At trial, the plaintiff provided expert testimony[26] in an attempt to prove that Dr. Copeland failed to follow the

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Surgeons § 82 (1942).

[23] 112 So. 2d 236, 241 (Miss. 1959), *overruled by* Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985).

[24] *Copeland*, 112 So. 2d at 241. In defining the newly adopted locality rule, the *Copeland* court stated that "a physician is bound to bestow such reasonable and ordinary care—skill, and diligence as physicians and surgeons in good standing in the same neighborhood, in the same general line of practice, ordinarily have and exercise in like cases." *Id.* (emphasis omitted); *see* Pharr v. Anderson, 436 So. 2d 1357, 1360-61 (Miss. 1983) (holding lower court properly instructed jury that physician must exercise degree of care other physicians in good standing in community would exercise in similar situation); Hill v. Stewart 209 So. 2d 809, 812 (Miss. 1968) (stating that physician must possess that reasonable level of learning, skill, and experience ordinarily exercised by other members of his profession), *overruled by* Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985); DeLaughter v. Womack, 164 So. 2d 762, 766 (Miss. 1964) (recognizing general understanding that physician was liable to patient for neglecting to use required level of skill and care), *overruled by* Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985). *But cf.* Dazet v. Bass, 254 So. 2d 183, 187 (Miss. 1971) (recognizing that there was force in argument that court should modify locality rule because of modernization in practice of medicine).

[25] *Copeland*, 112 So. 2d at 237. The defendant doctor removed several of the plaintiff's female organs during an operation that was allegedly scheduled for the purpose of removing an ovarian cyst. *Id.* at 238. The physician claimed that the patient consented to an exploratory operation. *Id.* Due to post operative complications, the patient sought a second opinion from another doctor. *Id.*

[26] *Id.* at 238-40. The *Copeland* court discussed the proposition that experts must decide if a physician has exercised the required level of care in a particular situation. *Id.* at 241 (citing Sanders v. Smith, 27 So. 2d 889, 890 (Miss. 1946)); *see also* Kelley v. Frederic, 573 So. 2d 1385, 1387 (Miss. 1990) (acknowledging plaintiff may generally not recover in medical malpractice suit absent expert testimony that defendant failed to use proper care); Hammond v. Grissom, 470 So. 2d 1049, 1053 (Miss. 1985) (recognizing that plaintiff was required to present expert medical testimony in order to recover in medical malpractice case); Kilpatrick v. Mississippi Baptist Medical Ctr., 461 So. 2d 765, 768 (Miss. 1984) (stating that court required expert witnesses in medical malpractice cases).

appropriate standard of treatment among physicians in the area.[27] The *Copeland* court affirmed the lower court's decision in favor of the plaintiff.[28] The supreme court then set forth the locality rule as; a physician must exercise the level of skill and care that other physicians in the same neighborhood in a similar practice ordinarily exercise in like cases.[29]

C. Mississippi's Move Toward the National Standard of Care

Mississippi took its next important step in medical malpractice law when the supreme court expanded the well-recognized locality rule in *King v. Murphy*.[30] In *King*, the plaintiff severely cut himself in an accident which eventually led to the amputation of his left leg above the knee.[31] At trial, the lower court allowed the plaintiff's expert, a physician from another

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[27] *Copeland*, 112 So. 2d at 238-40. The plaintiff's expert testified that Dr. Copeland failed to properly treat the patient's infection, wrongly performed an operation when the patient was sick with a severe cold, and failed to follow the proper procedures in diagnosing a particular disease. *Id.* at 239. Another expert, testifying on behalf of the plaintiff, stated that Dr. Copeland failed to meet the local standard because he did not perform a complete history and physical examination on the patient prior to the operation. *Id.* Four doctors testified on behalf of Dr. Copeland stating that they had known him for a lengthy period of time and that they believed he was a qualified and capable physician. *Id.* at 241.

[28] *Id.* at 242-43 The court concluded that since the jury instructions explaining the defendant's required level of care were clear and indicative of the applicable standard the verdict should be affirmed. *Id.* at 242-43.

[29] *Id.* at 241-43. The court reasoned that doctors were limited to the knowledge of their locality and should only be responsible for such knowledge. *Id.*

[30] 424 So. 2d 547, 550 (Miss. 1982), *modified*, Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985).

[31] *King*, 424 So. 2d 547 at 548-49. The plaintiff accidentally cut his leg with a chainsaw while trimming limbs from a fallen tree. *Id.* at 547. Shortly after the accident, the plaintiff's boss took him to the local hospital where the defendant doctor treated him for the next two days. *Id.* at 548. While at the local hospital, the defendant prescribed several medications to regulate the patient's blood pressure, consistently debrided the patient's wound, and ordered blood from the Birmingham Red Cross for a possible transfusion. *Id.* at 548. After his second day in the local hospital, the physician transferred the patient to a hospital in Memphis because he developed complications from a blood transfusion ordered by the defendant. *Id.* Upon arriving in Memphis, another doctor examined the patient and determined that it was necessary to amputate his left leg above the knee due to a severe infection within the wound. *King*, 424 So. 2d at 549.

state, to testify concerning the procedures the defendant should have used in treating the patient.[32] Based on the expert's testimony, the jury returned a verdict in favor of the plaintiff.[33] On appeal, the Mississippi Supreme Court held that the trial court erred in allowing the plaintiff's expert to testify.[34] Furthermore, the court expanded the locality rule by stating that physicians would be held to the degree of skill and care of other physicians in similar practices in the state and for a reasonable distance adjacent to state lines.[35]

Mississippi took another significant step in medical malpractice law when the supreme court clarified the *King* locality rule in *Hall v. Hilbun*.[36] The *Hall* court explained the modified locality rule under a basic theory of modernization[37] and stated that the reasons justifying the old locality rule had become obsolete.[38] As a result of *Hall*, Mississippi currently employs the national standard of care.[39]

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[32] *Id.* at 550. The plaintiff's expert, a physician from Florida, testified that the defendant negligently performed almost all of the procedures. *Id.*

[33] *Id.* at 547. Although the lower court expressed doubts about whether the plaintiff's expert was familiar enough with the locality to testify concerning the appropriate standard of care, the court admitted the expert's testimony and ruled in favor of the plaintiff. *Id.* at 551.

[34] *Id.* The *King* court recognized that the extended locality rule allowed an expert witness who was familiar with Mississippi's standard of care to testify even if he did not practice within the state. *Id.* at 550.

[35] *Id.* at 551. The court held that the plaintiff's expert was unqualified to testify under the newly expanded locality rule. *Id.* The plaintiff's expert had never practiced medicine in Mississippi and was not familiar with the standards that applied to physicians in the area. *Id.* at 550-51.

[36] 466 So. 2d 856, 873 (Miss. 1985).

[37] *Hall*, 466 So. 2d at 867. The *Hall* court recognized that the standards regulating admission into medical schools were similar across the country, the curricula were largely identical, physicians were more mobile than in years past, and there was now an abundant supply of material on continuing medical education. *Id.* at 870.

[38] *Id.* at 867. The courts originally created the locality rule because in years past courts "perceived physicians as more or less isolated in their local communities and held the level of care they were obligated to render was that generally prevailing in the community." *Id.* at 870.

[39] *Id.* at 873. In defining the national standard of care, the *Hall* court stated that each physician had a duty to use his knowledge to treat patients with that level of reasonable skill and competence used by minimally qualified physicians in the same type of practice and with access to similar resources throughout the

D. The "Mere Error of Judgment" Phrase in Mississippi Law

A number of jurisdictions adhere to the rule that a physician must always use his best judgment, but in choosing between acceptable treatments he is not liable for errors in judgment.[40] Although some jurisdictions acknowledge that an honest error in judgment is not indicative of medical malpractice, a growing number of courts disfavor the use of such language in jury instructions.[41]

Mississippi first saw the "mere error of judgment" language in *Hall*, when Justice Robertson stated that "[a] competent physician is not liable *per se* for a mere error of judgment, mistaken diagnosis or the occurrence of an undesirable result."[42] *Hall* was a medical negligence case in which the Mis-

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United States. *Id.*; *see* Miles v. Catchings Clinic, 601 So. 2d 47, 49-50 (Miss. 1992) (upholding jury instruction based on national standard of care); Marshall v. Clinic for Women, 490 So. 2d 861, 864 (Miss. 1986) (recognizing adoption of national standard of care in Mississippi); Trapp v. Cayson, 471 So. 2d 375, 380 (Miss. 1985) (stating that national standard of care was basis of Mississippi medical malpractice law).

[40] Joan P. Dailey, Comment, *The Two Schools of Thought and Informed Consent Doctrines in Pennsylvania: A Model for Integration*, 98 DICK. L. REV. 713, 715 (1994). Many courts have held that a doctor's error in judgment can not stray from the standard of care recognized by similar professionals. *Id.* The logic supporting the "honest error of judgment" rule was that an unfavorable result did not necessarily indicate a poor decision if there was more than one reasonable option from which to choose. Melvin A. Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. PITT. L. REV. 945, 962 (1990).

[41] Dailey, *supra* note 40, at 715. The "error in judgment" rule was problematic because when there was more than one acceptable treatment a doctor was not negligent for selecting one of them. Mark A. Hall, *The Defensive Effect of Medical Malpractice Policies in Malpractice Litigation*, 54 LAW & CONTEMP. PROBS. 119, 128 (1991). One authority noted that courts moved away from the "error in judgment" charge because a doctor's use of his best judgment did not overcome evidence of incompetence. Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. The Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587, 602-03 (1994).

[42] *Hall*, 466 So. 2d at 866; *see also* Harris v. Shields, 568 So. 2d 269, 273 (Miss. 1990) (stating that competent dentist was not liable per se for "mere error of judgment"); Clayton v. Thompson, 475 So. 2d 439, 444 (Miss. 1985) (citing *Hall*, 466 So. 2d at 856) (recognizing that physician was not liable per se for "mere error of judgment"); *cf.* Hudson v. Taleff, 546 So. 2d 359, 364 (Miss. 1989) (acknowledging that Mississippi case law did not make physician guarantor of successful treatment and care); Dazet v. Bass, 254 So. 2d 183, 187 (Miss. 1971)

sissippi Supreme Court reversed the trial judge's decision not to allow the plaintiff's experts to testify under the then-existing locality rule.[43] The *Hall* court held that the trial court should have allowed the plaintiff's experts to testify even though they lived and practiced medicine in a state other than Mississippi.[44]

Mississippi courts have used the "mere error of judgment" phrase in only a few instances, while other jurisdictions have expressed differences in opinion concerning whether that language was appropriate in medical malpractice jury instructions.[45] Some authorities have noted that a number of jurisdictions adhered to the rule that a physician was not liable for an honest error in judgment when there were numerous acceptable methods of treatment.[46] On the other hand, a grow-

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(recognizing that physician did not incur liability for all unfavorable results which occurred in medical malpractice and physician did not guarantee good results); Rainey v. Horn, 72 So. 2d 434, 436 (Miss. 1954) (acknowledging that undesirable results of physician's treatment did not justify presumption of negligence).

[43] *Hall*, 466 So. 2d at 856, 864. In the lower court, the plaintiff attempted to call an expert witness from Ohio to establish that there was a national standard of care which the defendant was obligated to follow. *Id.* at 863-64.

[44] *Id.* at 879. The *Hall* court stated that it would allow each of the plaintiff's experts to testify at the new trial concerning knowledge of the practice of medicine possessed by other minimally qualified physicians throughout the United States. *Id.*

[45] *See Harris*, 568 So. 2d at 273 (using mere error of judgment language); *Clayton*, 475 So. at 444 (citing *Hall*, 466 So. 2d at 866) (recognizing mere error of judgment language). Many courts have instructed juries that doctors were not liable for honest errors of judgment based on the theory that medicine was not an exact science. P. Brandt Shelbourne, Note, Rogers v. Meridian Park Hospital: *The Demise of the "Error in Judgment/Honest Mistake" Jury Instruction in American Medical Malpractice Trials*, 14 AM. J. TRIAL ADVOC. 221, 221 (1990). However, a growing number of states have found the "honest error in judgment" instruction no longer appropriate. *Id.*

[46] ANGELA R. HOLDER, MEDICAL MALPRACTICE LAW 58 (2d ed. 1978) (noting holdings in New Hampshire and Oregon as support). A simple error will not subject a physician to liability if he acted within the recognized standard of care. *Id.*; *see also* Ward v. U.S., 838 F.2d 182, 187 (6th Cir. 1988) (acknowledging that honest error in judgment was not adequate to hold physician negligent); Schueler v. Strelinger, 204 A.2d 577, 584-85 (N.J. 1964) (holding that doctor was not liable for error in judgment if incorrect decision was in compliance with standard of care); Brault v. Kenmore Mercy Hosp., 530 N.Y.S.2d 369, 370 (N.Y. App. Div. 1988) (ruling "error in judgment" instruction appropriate when physician was

ing number of states have held that the "mere error of judgment" instruction was inappropriate.[47] One reason this language fell into disfavor was the instruction could easily mislead the jury, causing it to believe that a physician was not liable for malpractice even if he performed negligently.[48]

II. *DAY V. MORRISON*

A. Opinion of the Court

In *Day v. Morrison*,[49] the Mississippi Supreme Court ruled that the two disputed jury instructions precluded the plaintiffs from ever recovering in a medical negligence case.[50]

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choosing between numerous medically accepted treatments); Spadaccini v. Dolan, 407 N.Y.S.2d 840, 846 (N.Y. App. Div. 1978) (upholding use of "error of judgment" instruction where other treatment methods were available).

[47] Shelbourn, *supra* note 45, at 221. A growing number of courts have rejected the "error in judgment/honest mistake" charge because it was misleading, confusing, and contradictory. Also, the instruction clashed with those instructions based on the ordinary standard of care, it was not appropriate in the context of modern standards of care, and it allowed the consideration of intent and morals into negligence actions. *Id.* at 237-38; *see* DAVID M. HARNEY, MEDICAL MALPRACTICE § 21.6 (3d ed. 1993) (stating "error in judgment" instruction was "argumentative and prejudicial"); *see also* Wall v. Stout 311 S.E.2d 571, 577 (N.C. 1984) (holding that phrase "honest error" in medical malpractice jury instruction was confusing and inappropriate); Rogers v. Meridian Park Hosp., 772 P.2d 929, 933 (Or. 1989) (holding that court erroneously instructed jury that doctor was not liable for "error of judgment" because that language could lead one to believe that some types of negligence were not culpable); Kobos v. Everts, 768 P.2d 534, 549-50 (Wyo. 1989) (Cardine, C.J., specially concurring) (recognizing that instruction which stated that physician who acted honestly and reasonably would not incur liability was excessively confusing); *cf.* Ouellette v. Subak, 391 N.W.2d 810, 816 (Minn. 1986) (ruling "honest error in judgment" language inappropriate in developing scope of physician's duty).

[48] Riggins v. Mauriello, 603 A.2d 827, 831 (Del. 1992). The *Riggins* court stated that it was more appropriate to instruct a jury that a physician was not liable for incorrectly making a good faith choice between acceptable treatments. *Riggins*, 603 A.2d at 831; *see also* Shumaker v. Johnson, 571 So. 2d 991, 994 (Ala. 1990) (holding that jury instruction based on physician's standard of care could not contain language that would absolve defendant for making "honest mistake"); Logan v. Greenwich Hosp. Ass'n, 465 A.2d 294, 303 (Conn. 1983) (stating in dicta that "bona fide error in judgment" instruction only confused jury because it implied that only bad faith judgment was actionable).

[49] 657 So. 2d 808 (Miss. 1995).

[50] *Day*, 657 So. 2d at 815. The portions of the jury instructions the Days

The *Day* court acknowledged that a number of other jurisdictions have strongly criticized the "bona fide" or "good faith" judgment language when used in jury instructions in a medical negligence suit.[51] The court outlined the three Mississippi cases that introduced the "mere error of judgment" language into Mississippi case law.[52] Moreover, the majority recognized that the most recent Mississippi decision using the "mere error of judgment" language cited questionable authority in support of that phrase.[53] The *Day* court cited two other cases

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disputed included the phrases "a competent physician is not liable per se for a mere error of judgment" and "liability may never be imposed upon a physician for the mere exercise of a bona fide medical judgment." *Id.* at 809. The court stated that the two instructions, when read together, had the effect of telling the jury that the defendant doctor was not liable even if he was negligent, did not perform up to minimally accepted standards, or made a mistake. *Id.* at 812.

[51] *Id.* The Mississippi Supreme Court recognized several jurisdictions in which courts have found clear error in medical negligence jury instructions that included the "mere error of judgment" phrase because that language confused the jury. *Id.* at 812-13 (citing Shumaker v. Johnson, 571 So. 2d 991, 994 (Ala. 1990); Riggins v. Mauriello, 630 A.2d 827, 831 (Del. 1992)). The *Day* court further recognized that a large number of courts in recent years have abandoned the "good faith" rule. *Id.* at 813 (citing Ouellette v. Subak, 391 N.W.2d 810, 815 (Minn. 1986); Rogers v. Meridian Park Hosp., 772 P.2d 929, 932 (Or. 1989); Kobos v. Everts, 768 P.2d 534, 538 (Wyo. 1989)).

[52] *Id.* at 813-14. The *Day* court recognized that the "mere error of judgment" language first entered Mississippi case law in Hall v. Hilbun, 466 So. 2d 856, 866 (Miss. 1985), where the Mississippi Supreme Court stated in dicta that "[a] competent physician is not liable *per se* for a mere error of judgment, mistaken diagnosis or the occurrence of an undesirable result." *Day*, 657 So. 2d at 813 (quoting *Hall*, 466 So. 2d at 866. The *Day* court acknowledged that the "mere error of judgment" language next appeared in Clayton v. Thompson, 475 So. 2d 439, 444 (Miss. 1985), where the Mississippi Supreme Court pronounced the phrase as law. *Day*, 657 So. 2d at 814. The *Day* court then stated that the Mississippi Supreme Court most recently used the "mere error of judgment" language in Harris v. Shields, 568 So. 2d 269, 272-73 (Miss. 1990), where the court used that phrase in a dental malpractice case. *Day*, 657 So. 2d at 814.

[53] *Day*, 657 So. 2d at 814. The majority recognized that the *Harris* court incorrectly cited case law in support of using the "mere error of judgment" phrase because the alleged supporting authority never used that particular language. *Id.* (citing Hudson v. Taleff, 546 So. 2d 359, 364 (Miss. 1989)). The *Day* court acknowledged that *Hudson* held that a physician was not liable for every unfortunate result in medical malpractice and that it was impossible for a physician to insure success in the treatment of his patients. *Id.* (citing *Hudson*, 546 So. 2d at 364).

in which the Mississippi Supreme Court dealt with issues related to the creation and review of jury instructions.[54]

In addressing the medical standard of care, the *Day* court stated that what was expected of physicians was more understandable when viewed in traditional negligence language.[55] The *Day* court provided several definitions of the word "error" to illustrate the different ways a jury could perceive that word[56] and cited a recent Mississippi case defining the terms "reasonably prudent" and "minimally competent" to help clarify the use of those phrases in the context of medical malpractice law and the applicable standard of care.[57] The majority concluded that the two jury instructions were preemptive in nature. Further, the court noted that the jury could not be expected to distinguish between the two charges since Dr. Morrison either acted competently, or failed to do so, regardless of whether he had made an "error of judgment."[58]

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[54] *Id.* The *Day* court cited Freeze v. Taylor, 257 So. 2d 509, 511 (Miss. 1972), where the supreme court stated that it disapproved of the practice of patterning jury instructions directly from language found in the court's prior opinions. *Day*, 657 So. 2d at 814. The *Day* court also cited Payne v. Rain Forest Nurseries, Inc., 540 So. 2d 35, 40-41 (Miss. 1989), where the court held that it viewed jury instructions as a whole in order to learn if the jury received proper instructions. *Day*, 657 So. 2d at 814.

[55] *Day*, 657 So. 2d at 814. The court reasoned that because Dr. Morrison had only one way to correct Day's problem, he could not choose alternative methods, and the "mere error of judgment" instruction was inappropriate. *Id.*

[56] *Id.* The *Day* court defined the word "error" as "an act or condition of ignorant or imprudent deviation from a code of behavior" and stressed that a patient did not compensate a doctor to perform imprudently. *Id.* (citing MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 34 (10th ed. 1994)).

[57] *Id.* at 815. The *Day* court defined the term "reasonably prudent" as the "care and diligence a professional must bring to a task" and the term "minimally competent" as the "degree of skill and knowledge a professional must bring to the task." *Id.* (quoting McCarty v. Mladineo, 636 So. 2d 377, 381 (Miss. 1994)). The *Day* court further used *McCarty* to illustrate that malpractice cases were different from ordinary negligence cases because the professional person must act as a reasonably prudent person with the required level of skill and knowledge would act under similar circumstances. *Id.*

[58] *Id.* The *Day* court stressed that the jury could not distinguish the two charges granted by the lower court because, on the one hand, the instruction basis was the traditional standard of care, and on the other hand, it stated that a doctor would not incur liability if he made a "mere error of judgment." *Id.*

B. Dissenting Opinion

Chief Justice Hawkins, joined by Presiding Justice Prather and Justice Smith, dissented.[59] The dissenting justices argued that the defense instruction using the "mere error of judgment" language was a correct statement of the law in Mississippi.[60] They also acknowledged that Mississippi law has historically recognized the practice of medicine as an inexact science and that doctors commonly disagree.[61] In conclusion, Chief Justice Hawkins stated that, the majority would have one believe that a competent physician who exercised reasonable care could still incur liability for a "mere error of judgment" even in the absence of any negligence.[62]

III. DISCUSSION

In *Day v. Morrison*,[63] Mississippi joined a growing number of states in rejecting the use of the "mere error of judgment" phrase in medical malpractice jury instructions. Consequently, the *Day* decision will likely have several significant effects on the field of medical malpractice law in Mississippi.

As a result of the *Day* holding, a negligent physician may no longer be able to avoid liability simply by claiming that he

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[59] *Id.* at 815-16 (Hawkins, C.J., dissenting). The dissenting justices stated that the defense instruction did not constitute reversible error. *Id.* at 817 (Hawkins, C.J., dissenting).

[60] *Day*, 657 So. 2d at 817 (Hawkins, C.J., dissenting). The dissenting justices reasoned that the majority incorrectly interpreted the jury instruction because it failed to examine the explanatory statement following the "mere error of judgment" language which adequately set forth Dr. Morrison's standard of care. *Id.* at 816 (Hawkins, C.J., dissenting). Furthermore, Chief Justice Hawkins examined the plaintiff's jury instructions and concluded that the actual instructions given to the jury contained nothing different from the plaintiff's instructions. *Id.* at 816-17 (Hawkins, C.J., dissenting).

[61] *Id.* (Hawkins, C.J., dissenting). The dissenting justices reasoned that it was impossible for a doctor to know the most appropriate treatment for a patient before a particular event ever occurred. *Id.* (Hawkins, C.J., dissenting).

[62] *Id.* (Hawkins, C.J., dissenting). Chief Justice Hawkins stated that prior to the *Day* decision a physician was liable for failing to exercise the appropriate degree of care, not because he would have chosen another procedure in hindsight. *Id.* (Hawkins, C.J., dissenting).

[63] 657 So. 2d 808 (Miss. 1995).

made an error in judgment.[64] Prior to *Day*, physicians could, at times, escape liability for negligent treatment because the law recognized that the practice of medicine was not an exact science and that it was common for physicians to disagree on appropriate courses of treatment in similar circumstances.[65] The *Day* decision could have additional ramifications for physicians because courts may interpret the ruling in a manner in which physicians will be held liable for unfavorable results, even if the physician exercised the best care possible but still failed to meet the required standard of care.[66]

The decision in *Day* could also make it easier for plaintiffs to recover in medical negligence cases since physicians will no longer be able to claim that they made a "mere" error in judgment when they actually performed negligently.[67] However, plaintiffs must still meet the traditional burden of proof required in negligence actions.[68] Moreover, the *Day* court's rejection of the "mere error of judgment" language does not change the standard of care required of physicians in Mississippi. Physicians must still exercise the degree of skill and care possessed by minimally competent professionals in the

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[64] *Day*, 657 So. 2d at 814. The *Day* court pointed out that a physician could too easily claim that he used his best judgment even when he made a mistake. *Id.*

[65] *See supra* notes 40, 42, 45, 46 and accompanying text. Courts recognized that physicians would not incur liability if they made an error in judgment which led to an unfavorable result. *See supra* notes 42, 42, 45, 46 and accompanying text.

[66] *See supra* notes 47-48 and accompanying text. The "mere error of judgment" instruction allows a jury to consider a physician's intent and morals when it should only focus on whether or not the physician met the required standard of care. *See supra* notes 47-48 and accompanying text.

[67] *See supra* note 41 and accompanying text. Even if a doctor uses his best judgment and performs in a manner that he believes is appropriate, he will still be liable if he did not act competently in treating the patient. *See supra* note 41 and accompanying text.

[68] *See supra* note 11 and accompanying text. In order for a physician to incur liability for damages, the plaintiff must prove by a preponderance of the evidence that: (1) the physician owed to the plaintiff a duty not to expose him to an unreasonable risk of harm; (2) the physician breached that duty; (3) the breach was a proximate cause of injury to the plaintiff; and (4) the plaintiff suffered an actual injury. *See supra* note 11 and accompanying text.

medical field throughout the United States.[69] Rather, the decision merely eliminated language that could potentially mislead and confuse a jury regarding the appropriate standard of care.[70]

IV. CONCLUSION

Day evidences Mississippi's intolerance of confusing and misleading language in jury instructions in medical malpractice cases. On a broader scope, the case illustrates the Mississippi Supreme Court's willingness to develop and advance important areas of medical malpractice law. While the *Day* court did not change the standard of care for a physician in a medical malpractice action, the court rejected the "mere error of judgment" language in jury instructions. Thus, with the abolishment of the physician's best judgment defense, future courts will allow plaintiffs to recover as long as they prove the traditional negligence elements and a breach of the appropriate standard of care. While *Day* possibly signals the court's willingness to make additional changes in the medical malpractice area, for now, *Day* stands for the proposition that Mississippi courts will no longer allow the "mere error of judgment" language in medical malpractice jury instructions.

Jim Wilson

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[69] *See supra* notes 37, 39 and accompanying text. Physicians must exercise the degree of skill and care that is exercised by other minimally competent medical professionals in like cases who have access to similar resources throughout the United States. *See supra* notes 37, 39 and accompanying text.

[70] *See supra* notes 41, 47, 48 and accompanying text. It is also important to note that Mississippi courts have for many years successfully decided medical negligence cases without the "mere error of judgment" language appearing in jury instructions at all. *See supra* notes 22-39 and accompanying text.

FAMILY LAW—REHABILITATIVE ALIMONY—AN ANSWER TO MISSISSIPPI'S INCONSISTENT TREATMENT OF DURATIONAL ALIMONY

After four years of marriage, Jeanette Tyler Hubbard [hereinafter Jett] filed for divorce[1] from her husband, David A. Hubbard [hereinafter David].[2] When Jett married David, she was in a stable financial situation,[3] while David was starting a chiropractic business.[4] Over the course of their marriage, Jett's personal financial condition worsened,[5] while David's business became more profitable.[6] During this time, the couple also experienced marital difficulties.[7]

Jett left David in 1990 and filed a complaint for divorce, which the Lincoln County chancellor granted.[8] In awarding

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[1] Hubbard v. Hubbard, 656 So. 2d 124, 126 (Miss. 1995).

[2] *Hubbard*, 656 So. 2d at 126. Jett filed her complaint on the grounds of habitual cruel and inhuman treatment, adultery, or, in the alternative, irreconcilable differences. *Id.*

[3] *Id.* At the beginning of their marriage, Jett continued to work in Atlanta, Georgia and commuted on weekends to Brookhaven, Mississippi where David had started his business. *Id.* While in Atlanta, Jett made approximately $30,000 working for a temporary agency and $10 per hour working part-time. *Id.* She owned two rental houses in Alabama and had about $10,000 in cash. *Id.* Jett sold her two houses in August and December of 1988 and made a net profit of roughly $100,000. *Hubbard*, 656 So. 2d at 126.

[4] *Id.* at 125. David's chiropractic business struggled in the beginning, making only $994.83 during 1987. *Id.* at 133.

[5] *Id.* at 126. With the proceeds from the sale of her rental houses, Jett started a woman's apparel business. *Id.* Jett also claimed to have loaned David approximately $8000. *Id.* By 1992, Jett's business was over $90,000 in debt. *Id.* Jett eventually sought Chapter 13 bankruptcy protection. *Hubbard*, 656 So. 2d at 126.

[6] *Id.* at 133. David's net profit rose continually during the four years of his marriage to Jett. *Id.* By 1991, David had a net profit of $47,951.71. *Id.*

[7] *Hubbard*, 656 So. 2d at 126. Problems arose between Jett and David because of his continuous flirting and admitted adulterous behavior. *Id.*

[8] *Id.* Jett and David separated in December of 1990. *Id.* Jett attached to her complaint for divorce a request for a judgment against David for unpaid loans

alimony, Chancellor Patterson considered the various factors of lump sum and periodic alimony and awarded Jett "rehabilitative periodic alimony" in the amount of $600 per month for thirty-six months.[9] Upon appeal of the divorce decree, the Mississippi Supreme Court held: Affirmed.[10] The court held that rehabilitative periodic alimony was an equitable tool that a chancellor might use, in his or her discretion, to help a spouse in need become self-sufficient and not destitute during the adjustment period following a divorce.[11]

I. Related Law

A. Alimony in Mississippi

The theory of alimony developed from a husband's obligation to maintain his wife's social status.[12] In Mississippi, the

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she allegedly made to him that totaled approximately $8000. *Id.* Admitting that Jett was entitled to a divorce on the grounds of adultery, David also counterclaimed for bills she allegedly owed him. *Id.* In granting the divorce and alimony, the chancellor awarded Jett $3300 in attorney's fees and dismissed both claims of debt because the amounts of debt were so similar. *Hubbard*, 656 So. 2d at 126.

[9] *Id.* at 126. The chancellor based his determination on the needs of Jett and David. *Id.* The chancellor denied David's Motion to Alter the Judgment and For Relief from the Judgment. *Id.*

[10] *Id.* at 131.

[11] *Id.* at 129-30. Because the chancellor properly considered the relevant factors, the court held that he had not abused his discretion. *Id.* at 130. The court thought that giving rehabilitative alimony was the most equitable award since the marriage lasted only four years, both parties were relatively young, and Jett had prior work experience. *Id.*

[12] Ira M. Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 1, 5-6 (1989). Society considered support for a dependent woman as a duty of the husband. *Id.* at 5. "Originally, alimony substituted for the husband's duty to support his wife." Linda B. Marshall, *Rehabilitative Alimony: An Old Wolf in New Clothes*, 13 N.Y.U. Rev. L. & Soc. Change 667, 670 (1985). The common law view was that a husband, with consideration as to his ability, should support his wife at her present level. Thomas W. Crockett & J. Randall Patterson, *Dividing the Property in a Marital Dissolution*, 62 Miss. L.J. 57, 58 (1992); *see* Weiss v. Weiss, 579 So. 2d 539, 541-42 (Miss. 1991) (holding that spouse must provide support for other spouse); Brendel v. Brendel, 566 So. 2d 1269, 1273 (Miss. 1990) (holding because of husband's financial condition, award of $750 per month in periodic alimony not abuse of discretion); East v. East, 493 So. 2d 927, 931 (Miss. 1986) (stating since periodic alimony stems from idea that it was husband's duty to support his wife, award may be modified upon change in circumstances).

chancery courts had the authority to allow a divorce and grant various equitable awards either singularly or in combination.[13] Furthermore, in consideration of the facts and circumstances of each divorce, the chancery court had wide latitude in awarding alimony.[14] Once the chancellor awarded alimony, the trial court's decision would not be reversed unless it was manifestly in error.[15]

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[13] Bowe v. Bowe, 557 So. 2d 793, 794 (Miss. 1990). The chancellor may use either periodic alimony, lump sum alimony, property division, or a grant of equitable interest. *Bowe*, 557 So. 2d at 794. In consideration of the various types of awards, the court opined that "[t]here are no clear lines of demarcation between these, nor should there be, and our courts have long been authorized in their sound discretion to use one or several or all in combination." *Id.*; *see, e.g.,* Skinner v. Skinner, 509 So. 2d 867, 869 (Miss. 1987) (granting wife periodic and lump sum alimony); Tutor v. Tutor, 494 So. 2d 362, 365 (Miss. 1986) (holding wife should be awarded periodic as well as lump sum alimony).

[14] MISS. CODE ANN. § 93-5-23 (Supp. 1993). Section 93-5-23 provides as follows:

> When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders . . . touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him . . . .

Id. The chancery court may modify a decree when there has been a substantial change in the circumstances. Shearer v. Shearer, 540 So. 2d 9, 12 (Miss. 1989); *see* Carpenter v. Carpenter, 519 So. 2d 891, 894-95 (Miss. 1988) (holding wife not entitled to alimony when her estate was larger than her husband's); Colvin v. Colvin, 487 So. 2d 840, 841 (Miss. 1986) (ruling periodic alimony may be modified upon material change in circumstances).

[15] McNally v. McNally, 516 So. 2d 499, 501 (Miss. 1987). The court will not alter the chancellor's decision concerning the granting of alimony unless it is found to be "oppressive, unjust or grossly inadequate so as to evidence an abuse of discretion." *McNally*, 516 So. 2d at 501; *see* McKee v. McKee, 382 So. 2d 287, 288 (Miss. 1980) (ruling careful consideration given to chancellor's decree); Martin v. Martin, 271 So. 2d 391, 394 (Miss. 1972) (stating chancellor's award must be abuse of discretion before decision overturned); Harrell v. Harrell, 231 So. 2d 793, 796 (Miss. 1970) (holding chancellor's ruling not set aside unless overcome by weight of evidence).

B. Types of Alimony

Mississippi chancellors must consider various factors before awarding periodic[16] and lump sum alimony.[17] Periodic alimony was a continuing monetary award in which the chancery court maintained jurisdiction.[18] When granted, periodic alimony vested as it accrued, could be modified, and ended upon the remarriage of the receiving spouse or the death of either spouse.[19]

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[16] Brabham v. Brabham, 84 So. 2d 147, 153 (Miss. 1955). The factors that a chancery court must consider are as follows:

1. the health of the husband and his earning capacity;
2. the health of the wife and her earning capacity;
3. the entire sources of income of both parties;
4. the reasonable needs of the wife;
5. the reasonable needs of the child;
6. the necessary living expenses of the husband;
7. the estimated amount of income taxes the respective parties must pay on their incomes;
8. the fact that the wife has the free use of the home, furnishings and automobile; and
9. such other facts and circumstances bearing on the subject that might be shown by the evidence.

Brabham, 84 So. 2d at 153; *see also* Hammonds v. Hammonds, 597 So. 2d 653, 655 (Miss. 1992) (adding to *Brabham* factors). The court added factors such as fault, standard of living, and length of marriage. *Hammonds*, 597 So. 2d at 655.

[17] Cheatham v. Cheatham, 537 So. 2d 435, 438 (Miss. 1988). In considering lump sum alimony, the court considers the following:

1. Substantial contribution to accumulation of total wealth of the payor either by quitting a job to become a housewife, or by assisting in the spouse's business.
2. A long marriage.
3. Where recipient spouse has no separate income or the separate estate is meager by comparison.
4. Without the lump sum award the receiving spouse would lack any financial security.

Cheatham, 537 So. 2d at 438. In deciding whether to give lump sum alimony, the court looked to the spouse's estate to see if it could sufficiently pay a lump sum alimony. Retzer v. Retzer, 578 So. 2d 580, 591 (Miss. 1990). The disparity of estates was the most important factor in awarding lump sum alimony. Tilley v. Tilley, 610 So. 2d 348, 352 (Miss. 1992).

[18] Crockett & Patterson, *supra* note 12, at 59-60. The chancery court continues jurisdiction in order to hear modification petitions. *Id.*

[19] Bowe v. Bowe, 557 So. 2d 793, 794 (Miss. 1990). Periodic alimony may be

The other traditional type of support in Mississippi was lump sum alimony.[20] Lump sum alimony acted as a final payment of any spousal support.[21] It differed from periodic support in that lump sum support vested upon judgment and was not modifiable.[22] Also, the supporting spouse could make installments in order to pay the lump sum alimony,[23] which the court usually gave in instances where both spouses had contributed to the assets amassed during the marriage.[24]

Within the last few decades, one of the most increasingly used forms of relief in the country was rehabilitative alimony.[25] It was defined as alimony which was paid over a defi-

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increased, decreased, or even terminated in a modification hearing. *Bowe*, 557 So. 2d at 794; *see* Smith v. Smith, 349 So. 2d 529, 531 (Miss. 1977) (holding alimony terminates upon death of paying spouse unless obligation of estate); Rubisoff v. Rubisoff, 133 So. 2d 534, 537 (Miss. 1961) (holding periodic support vests as it accrues); Vaughn v. Vaughn, 83 So. 2d 821, 825 (Miss. 1955) (ruling periodic alimony can be modified as well as terminate upon remarriage of receiving spouse).

[20] *Bowe*, 557 So. 2d at 794. Of the traditional forms of equitable tools given to the chancellor, only two are alimony awards. *Id.* The characteristics of lump sum alimony are payments over a specific period of time and a fixed amount of money. Holleman v. Holleman, 527 So. 2d 90, 92 (Miss. 1988).

[21] J. W. BUNKLEY, JR. & W. E. MORSE, BUNKLEY AND MORSE'S AMIS DIVORCE AND SEPARATION IN MISSISSIPPI § 6.07 (1957). Lump sum alimony acts as a final payment between husband and wife. *Id.*

[22] *Bowe*, 557 So. 2d at 795. Absent fraud, the court may not alter an award of lump sum alimony, and once granted, lump sum support becomes an obligation of the paying spouse's estate which must be paid even if death occurs. *Id.*

[23] *Id.* The obligor spouse may pay lump sum alimony in a single payment or in fixed payments. *Id.*; *see* Maxcy v. Estate of Maxcy, 485 So. 2d 1077, 1078 (Miss. 1986) (holding that lump sum alimony is payable in installments); Butler v. Hinson, 386 So. 2d 716, 717 (Miss. 1980) (ruling lump sum alimony becomes fixed liability and may be payable in fixed periodic installments); Aldridge v. Aldridge, 27 So. 2d 884, 886 (Miss. 1946) (allowing lump sum award of $7500 to be paid in installments).

[24] Clark v. Clark, 293 So. 2d 447, 449 (Miss. 1974) (citing Jenkins v. Jenkins, 278 So. 2d 446, 449 (Miss. 1973)). The court may award lump sum alimony in instances where the wife helped in the accumulation of marital assets or contributed to the marriage by being a dutiful wife. *Clark*, 293 So. 2d at 449; *see* Reeves v. Reeves, 410 So. 2d 1300, 1303 (Miss. 1982) (awarding 10% of husband's net estate not unreasonable). There is no set percentage that the chancellor should award. *Reeves*, 410 So. 2d at 1303.

[25] Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181,

nite period of time and allowed the receiving spouse to achieve a position of self-reliance.[26] Rehabilitative alimony encouraged the spouse to pursue a career or further previous training.[27] Apart from achieving spousal independence, rehabilitative alimony stopped the paying spouse from permanently maintaining a separate household and prevented the public from having to support the alimony recipient.[28] Furthermore, like periodic alimony, rehabilitative alimony vested as it accrued, ended upon the death of either spouse or the remarriage of the receiving spouse, and was modifiable.[29]

1226 (1981). By 1977, roughly two-thirds of all alimony awards in California were of limited duration. *Id.* By 1987, 29 states had legislation enabling the use of rehabilitative alimony. David H. Relsey & Patrick P. Fry, *The Relationship Between Permanent and Rehabilitative Alimony*, 4 J. AM. ACAD. MATRIM. LAW. 1, 6 (1988). Florida became the first state to use rehabilitative alimony and is now the leading state to control its use. Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L. Q. 573, 576 (1988).

[26] John C. Williams, Annotation, *Propriety in Divorce Proceedings of Awarding Rehabilitative Alimony*, 97 A.L.R.3D 740, 743 (1980). Rehabilitative alimony is similar to temporary alimony in that the support is only given for a short specified time. *Id.* In contrast to temporary alimony, rehabilitative alimony is "alimony *in futuro*" which attempts to create a more sustaining form of self-support. *Id.*; *see also* BLACK'S LAW DICTIONARY 1287 (6th ed. 1990) (quoting Sever v. Sever, 467 So. 2d 492, 494 (Fla. App. 1985)); Anu R. Mathur, *Indefinite Alimony: A Solution to the Financial Trauma of Divorce*, 10 PROB. L.J. 303, 312 (1991) (citing Turner v. Turner, 385 A.2d 1280, 1280 (N.J. 1978)).

[27] Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437, 504 (1988). The termination period in rehabilitative alimony can be viewed as the prod that forces a spouse to become self-sustaining. Marshall, *supra* note 12, at 674.

[28] Mathur, *supra* note 26, at 312-13. Rehabilitative alimony becomes a period to familiarize oneself with a more challenging way of life. *Id.* Rehabilitative alimony, if applied properly, helps break the economic link between former spouses and releases the paying spouse from permanent financial burden. Nancy A. Veith, Comment, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F. L. REV. 493, 495-96 (1978), *overruling recognized* by Deeds v. Deeds, 848 P.2d 1119 (N.M. App. 1993).

[29] Williams, *supra* note 26, at 744. The receiving spouse may petition the court for a modification similar to periodic alimony or for an extension of time. *Id.* Since a remarriage can be considered a type of rehabilitation, the rehabilitative alimony is terminated. *Id.* at 745.

C. Durational Alimony's Inconsistent Treatment

In recent years, Mississippi chancery courts have created a gray area in awarding alimony by attempting to grant various types of support with fixed termination periods.[30] Through the appeals of the various durational alimony awards, the supreme court has had ample opportunity to distinguish each alimony award in its struggle with granting rehabilitative alimony.[31]

1. Durational Alimony Construed as Periodic Support

The court discussed an attempt by a chancellor to award periodic alimony with a fixed termination date in *Cleveland v. Cleveland*.[32] In *Cleveland*, the court reversed a chancellor's grant of $600 per month for seven years and instead awarded periodic alimony with no termination date.[33] The court stated that setting a termination date for periodic alimony was manifestly in error.[34] In contrast, the court in *Box v. Box*,[35] while

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[30] Sharplin v. Sharplin, 465 So. 2d 1072, 1073 (Miss. 1985). Without specifying either periodic or lump sum alimony, the chancellor awarded the wife $100 per month as alimony for 36 months. *Sharplin*, 465 So. 2d at 1073. The court affirmed the award and construed it as periodic alimony. *Id.*; *see also* Holleman v. Holleman, 527 So. 2d 90, 92-93 (Miss. 1988) (holding that periodic alimony award of $2500 per month for 10 years was not lien against husband's estate). The court pointed out that the wife failed to argue that the award should be considered lump sum alimony, and such a determination was not available under a general prayer for relief. *Holleman*, 527 So. 2d at 92-93; Jordan v. Jordan, 510 So. 2d 131, 133 (Miss. 1987) (ruling that chancellor did not abuse his discretion in awarding alimony with fixed termination date when wife was qualified school teacher); Bonderer v. Robinson, 502 So. 2d 314, 315-16 (1986) (holding that award of scaled alimony with termination period after 12 years by chancery court was form of periodic alimony).

[31] Linda D. Elrod, *Summary of the Year in Family Law*, 27 FAM. L.Q. 485, 496 (1994). Mississippi seems to have the largest number of cases which distinguish between the types of, and the criteria for awarding the different types of alimony awards. *Id.*

[32] 600 So. 2d 193, 196 (Miss. 1992).

[33] *Cleveland*, 600 So. 2d at 197. The court increased the periodic award to $1000 with no termination limit and ruled that the lump sum alimony was not large enough. *Id.* at 198.

[34] *Id.* The court stated that periodic alimony was subject to change. *Id.* The

addressing a chancellor's award of periodic alimony with an automatic reduction after nine years, ruled that a chancellor's arbitrary reduction of alimony was an abuse of discretion.[36] However, in its holding the court indicated that a chancellor might reduce an award of periodic alimony if the record contained specific reasons for such a reduction.[37]

The court has created exceptions and allowed periodic alimony to have a set termination date as in *Gatlin v. Gatlin*.[38] The *Gatlin* court affirmed an award of temporary alimony for eighteen months and ordered the chancellor to retain jurisdiction.[39] The court reasoned that the recipient spouse was in need of support during the readjustment period.[40] In *Wray v. Wray*,[41] the court created another exception when it addressed a husband's appeal of the lower court's ruling that alimony of $400 per month for twenty-four months was lump sum alimony.[42] In holding that the award was a form of periodic alimony, the court ruled that where a judgment is ambiguous as to the type of alimony awarded, the

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court ruled that the chancellor was in error in setting a durational periodic award when there was no way to anticipate the needs of the spouse in seven years. *Id.*

[35] 622 So. 2d 284 (Miss. 1993).

[36] *Box*, 622 So. 2d at 287-88. The wife was to receive periodic alimony of $2400 per month for 108 months, after which it decreased to $900 until her death or remarriage. *Id.* at 287. Because of the interest in the maintenance of the child and the welfare of the spouse, the court found that the circumstances in this case did not warrant a reduction. *Id.* at 290.

[37] *Id.* at 290. The court held that a chancellor must cite specific reasons supported by the record in order to justify a reduction of periodic alimony. *Id.*

[38] 161 So. 2d 782, 783 (Miss. 1964).

[39] *Gatlin*, 161 So. 2d at 783. The court modified the decree by ordering the chancellor to retain jurisdiction in case circumstances developed to warrant reconsideration of the termination of support. *Id.*

[40] *Id.* The recipient spouse was chronically ill and owed substantial debts. *Id.* However, because the wife was relatively young and had some business experience, the court held that, after a period of adjustment, she would be able to support herself in a comfortable manner. *Id.*

[41] 394 So. 2d 1341 (Miss. 1981).

[42] *Wray*, 394 So. 2d at 1342-43. The chancellor's judgment also included a $200 per month periodic alimony after the expiration of the first 24 months. *Id.* at 1342. The husband wanted the alimony to be considered periodic alimony; therefore, the alimony would terminate upon his wife's remarriage. *Id.* at 1343.

court will construe it as periodic support.[43] The court reasoned that the circumstances necessitated an award of periodic support.[44]

2. Durational Alimony Construed as Lump Sum Support

Beginning with *Armstrong v. Armstrong*,[45] the court espoused the position that it deemed durational alimony awards as lump sum support.[46] In holding that the chancellor's award of $175 per month for two years was a form of lump sum support, the *Armstrong* court reversed and awarded the spouse permanent periodic alimony.[47] Similarly, in *Dufour v. Dufour*,[48] the court held that an award of "periodic transitional alimony," which attempted to ease the period of readjustment, was merely lump sum alimony payable in installments.[49] The court reasoned that in instances where there is

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[43] *Id.* at 1345. Periodic alimony will be awarded absent clear language that the chancery court intended to grant lump sum support. *Id.*; *see* Sharplin v. Sharplin, 465 So. 2d 1072, 1073 (Miss. 1985) (stating that if parties who write divorce settlement intend to create lump sum alimony, all ambiguous language should be removed).

[44] *Wray*, 394 So. 2d at 1345. The court specifically considered the wording of the decree and other consequences, such as the matter of taxation for the parties. *Id.* Justice Hawkins stated that if the chancellor had awarded a total amount to be paid over a period of time, the court would have ruled that it was lump sum alimony. *Id.* The court realized that if the award were deemed periodic then the payments would be considered a deduction by the payor and income by the recipient, whereas in a lump sum determination the payment is not a tax deduction to the payor. *Id.* Awarding periodic or lump sum form alimony creates tax advantages over calling the award property or lump sum settlement. Marshall, *supra* note 12, at 680.

[45] 618 So. 2d 1278 (Miss. 1993).

[46] *Armstrong*, 618 So. 2d at 1281. The time-limited support awarded to the wife was a form of lump sum alimony. *Id.*

[47] *Id.* at 1281-82. This case involved the ending of a 21 year marriage. *Id.* at 1279. The wife was a homemaker with a high school education and two children and had worked part-time during the marriage. *Id.* The trial court refused to give Mrs. Armstrong periodic alimony but awarded her $175 per month for two years as "rehabilitative alimony." *Id.* at 1280. Because it thought the award was inadequate, the supreme court changed the durational alimony to periodic alimony with no termination date. *Armstrong*, 618 So. 2d at 1281-82.

[48] 631 So. 2d 192 (Miss. 1994).

[49] *Dufour*, 631 So. 2d at 195. Setting a fixed termination date created lump

a determination of whether the divorce decree used periodic or lump sum alimony, the court is to consider the "substance of the provision and not the label."[50]

As recently as 1995, the court in *Creekmore v. Creekmore*[51] refused to construe an award of durational alimony as periodic support.[52] The trial court granted a combination of periodic and lump sum alimony in which the periodic support was to last for only twenty-four months.[53] In holding the durational award a form of lump sum support, the supreme court in *Creekmore* stated that "[a] fixed and certain sum of money which is due and payable over a *definite period of time* is clearly alimony in gross, or lump sum alimony . . . ."[54] Furthermore, in response to the husband's argument that the court previously allowed time limited periodic alimony,[55] the court specifically mentioned that only *Gatlin* inferred an award of durational periodic alimony.[56] To clarify

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sum alimony. *Id.*

[50] *Id.* The court held that in view of the duration of the marriage, age of the parties, and their respective financial positions the lump sum award was equitable. *Id.*; *see* Cunningham v. Lanier, 589 So. 2d 133, 137 (Miss. 1991) (holding that award can still be deemed lump sum alimony even though words "lump sum" are not used).

[51] 651 So. 2d 513 (Miss. 1995).

[52] *Creekmore*, 651 So. 2d at 519-20. The court held that the durational periodic alimony was lump sum alimony and remanded the case because the combination of the awards was so inadequate as to amount to an abuse of discretion. *Id.* at 520.

[53] *Id.* at 514. The spouse was 30 years old at the time of divorce and had studied child care for two years at a junior college. *Id.* at 515. The marriage produced a child of which the wife was awarded custody. *Id.* The chancellor awarded the wife $12,000 in lump sum alimony and $12,000 as periodic support payable in $500 installments. *Id.* at 514.

[54] *Id.* at 518 (alteration in original) (quoting Holleman v. Holleman, 527 So. 2d 90, 92 (Miss. 1988). The court held that the periodic award was really lump sum support because of the termination period. *Id.*

[55] *Id.* The husband argued that the supreme court allowed time limited periodic alimony in Holleman v. Holleman, 527 So. 2d 90, 92 (Miss. 1988), Jordan v. Jordan, 510 So. 2d 131, 133 (Miss. 1987), and Gatlin v. Gatlin, 161 So. 2d 782, 783 (Miss. 1964). *Creekmore*, 651 So. 2d at 518.

[56] *Creekmore*, 651 So. 2d at 518. The court admitted that *Gatlin* came close to supporting the husband's contention that the court approved durational periodic alimony. *Id.*

the distinction, the court pointed out that it modified *Gatlin* to require the chancellor to retain jurisdiction in the event that reconsideration became appropriate.[57]

II. *HUBBARD V. HUBBARD*

A. Opinion of the Court

The Mississippi Supreme Court granted the appeal of the Lincoln County Chancery Court's decision.[58] After consideration of the factors in this case, the court affirmed but realized the necessity of introducing the idea of rehabilitative periodic alimony.[59] The court began its analysis by reviewing the chancellor's consideration of the factors in awarding periodic and lump sum alimony.[60] However, the court recognized the various attempts to construe durational alimony as either periodic or lump sum support.[61]

The court reviewed the distinguishing characteristics of periodic and lump sum support, such as modifiability, time of vesting, and terminability.[62] Also, under settled Mississippi

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[57] *Id.* The court stated that in *Gatlin* it did not rule whether or not the chancellor should allow alimony after the period terminated but only required the chancellor to continue jurisdiction in case additional support was appropriate. *Id.*

[58] Hubbard v. Hubbard, 656 So. 2d 124, 127 (Miss. 1995). Jett filed her Notice of Appeal, and David filed his Notice of Cross-Appeal a few weeks after the chancery court decision. *Hubbard*, 656 So. 2d at 126. Jett asked the court to reverse the time limitation. *Id.* at 128.

[59] *Id.* at 127. The court reviewed the chancellor's consideration of the living standards, medical and insurance needs, and the right to lead a normal life. *Id.* at 128.

[60] *Id.* The chancellor looked to the lump sum factors set out in *Retzer* and the factors of periodic alimony in *Brabham*. *Hubbard*, 656 So. 2d at 128 (citing Retzer v. Retzer, 578 So. 2d 580, 591 (Miss. 1990); Brabham v. Brabham, 84 So. 2d 147, 153 (Miss. 1955)).

[61] *Id.* at 128-29. The court discussed Cleveland v. Cleveland, 600 So. 2d 193 (Miss. 1992), and noted that the circumstances in that case did not require a fixed termination period. *Hubbard*, 656 So. 2d at 128. The court noted that in Armstrong v. Armstrong, 618 So. 2d 1278 (Miss. 1993), it awarded periodic alimony instead of rehabilitative alimony because it was more equitable. *Hubbard*, 656 So. 2d at 128. The court also pointed out that in Dufour v. Dufour, 631 So. 2d 192 (Miss. 1994), an award of periodic transitional alimony, even though deemed lump sum support, was synonymous with rehabilitative alimony. *Hubbard*, 656 So. 2d at 129.

[62] *Hubbard*, 656 So. 2d at 129. The court can modify or terminate periodic

law, the court stated that it considers an ambiguous judgment to be a periodic alimony award.[63] However, the court opined that the "substance" of the award was the deciding factor.[64]

After applying the relevant factors and considerations, the court rejected the idea of construing Chancellor Patterson's award to be periodic or lump sum alimony.[65] The court ruled that under the discretion of the chancellor, there may be a time limit placed on periodic alimony which creates rehabilitative periodic alimony.[66] The court then stated the reason for granting the new equitable award.[67] In addition, the court stated that the traditional types of alimony remain unchanged, and the court proceeded to differentiate rehabilitative periodic alimony from periodic and lump sum alimony.[68] Lastly, the court reiterated that the chancellor did not abuse

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alimony if there are material changes in circumstances, whereas lump sum alimony is final. *Id.*; *see* Bowe v. Bowe, 557 So. 2d 793, 795 (Miss. 1990) (ruling lump sum is final settlement and therefore not subject to modification); Shearer v. Shearer, 540 So. 2d 9, 12 (Miss. 1989) (holding that upon petition and showing of material change in circumstances court can modify award of periodic alimony); Skinner v. Skinner, 509 So. 2d 867, 869 (Miss. 1987) (stating that periodic alimony terminates upon death of paying spouse or remarriage of receiving spouse); *see also* East v. East, 493 So. 2d 927, 931 (Miss. 1986) (holding that lump sum alimony vests upon judgment whereas periodic alimony vests as it accrues).

[63] *Hubbard*, 656 So. 2d at 129. The court cited *Dufour* where the supreme court stated that when it could not determine by the wording of a judgment whether it was lump sum or periodic, the court would consider the award periodic. *Id.*

[64] *Id.*

[65] *Id.* at 130. The court did not overrule the holding in *Cleveland* but established "rehabilitative periodic alimony" as another equitable tool which the chancellor may choose in settling a divorce. *Id.* The court held that courts should not confuse rehabilitative alimony with periodic alimony, which remains unchanged. *Id.*

[66] *Id.* at 129-30. The court held that periodic alimony can not have a fixed termination date. *Id.* at 130.

[67] *Id.* This new award is "an equitable mechanism which allows a party needing assistance to become self-supporting without becoming destitute in the interim." *Id.*

[68] *Hubbard*, 656 So. 2d at 130. Rehabilitative periodic alimony is similar to periodic alimony in that it is modifiable and vests as it accrues but differs in that it is not continual. *Id.* The intent of the granting chancellor differentiates rehabilitative alimony from lump sum support. *Id.* The court views lump sum alimony as an "equalizer" in order to be equitable. *Id.*

his discretion so as to be manifestly in error and therefore the court did not reverse.[69]

B. Dissenting Opinion of Justice Pittman

Justice Pittman stated in his dissent, in which Justice Smith joined, that necessity did not require the court to create rehabilitative periodic alimony.[70] He pointed out that because a spouse may petition the chancery court for a modification, periodic alimony has always been subject to a time limitation.[71] Furthermore, he espoused the logical argument that no chancellor could predict the future needs of any person.[72] Lastly, even though he believed that Mississippi did not need rehabilitative periodic alimony, Justice Pittman thought that the facts in this case required more than rehabilitative alimony in order to be equitable.[73]

C. Dissenting Opinion of Justice Smith

Justice Smith, joined by Presiding Justice Prather and Justice Pittman, dissented in a separate opinion.[74] He argued

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[69] *Id.* at 131. The court acknowledged that the chancellor considered the facts in this case sufficiently. *Id.* The court will not overturn an award unless it is manifestly in error. *Id.*

[70] *Id.* (Pittman, J., dissenting). Justice Pittman did not believe that it was necessary to create new alimony law. *Id.* (Pittman, J., dissenting).

[71] *Id.* (Pittman, J., dissenting). The court may terminate periodic alimony upon a showing of material change of circumstances. *Id.* (Pittman, J., dissenting). Justice Pittman referred to the present forms of alimony as "the best of all worlds" and noted that adopting a time limited award does not improve existing law. *Id.* at 131-32 (Pittman, J., dissenting).

[72] *Id.* at 131 (Pittman, J., dissenting). Justice Pittman believed that allowing the chancellor the opportunity to terminate payments in the future was contrary to past holdings. *Id.* (Pittman, J., dissenting).

[73] *Hubbard*, 656 So. 2d at 132 (Pittman, J., dissenting). Justice Pittman argued that it was not equitable for Mrs. Hubbard to have entered the marriage with a net worth of over $150,000 and leave owing approximately $90,500. *Id.* (Pittman, J., dissenting). There was some evidence that Mrs. Hubbard used her own money to support her husband while he was starting his practice. *Id.* (Pittman, J., dissenting). Furthermore, Justice Pittman stated that the majority opinion did not allow an opportunity to modify the time limitation. *Id.* (Pittman, J., dissenting).

[74] *Id.* (Smith, J., dissenting). Justice Smith concurred with the award of $3300

that the court had always construed alimony with a fixed termination period as lump sum support.[75] Because the court ultimately deemed periodic transitional alimony to be lump sum alimony, he rejected the majority's belief that the holding in *Dufour* supported their argument for rehabilitative periodic alimony.[76] Finally, he also illustrated that the facts in this case entitled Jett to a periodic alimony without time constraints.[77]

III. DISCUSSION

A. The Court Alters the Traditional Concept of Alimony

In theory, the traditional award of alimony, either periodic or lump sum, is a method by which a spouse can maintain his or her standard of living after a decree of divorce.[78] With the introduction of rehabilitative alimony in Mississippi, the court altered the traditional concept of alimony because the spouse no longer looks to the payor to maintain permanently his or her social status but must now prepare for financial independence.[79]

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in attorney's fees to Mrs. Hubbard but dissented with respect to the majority's creation of rehabilitative periodic alimony. *Id.* (Smith, J., dissenting).

[75] *Id.* (Smith, J., dissenting). "[T]his Court . . . has always held that such award was lump sum alimony, payable in fixed periodic installments." *Id.* (Smith, J., dissenting).

[76] *Id.* at 132-33 (Smith, J., dissenting). Justice Smith pointed out that, in *Dufour*, the court affirmed an award of "periodic transitional alimony" but held that it was actually lump sum alimony. *Id.* at 133 (Smith, J., dissenting).

[77] *Id.* at 133-34 (Smith, J., dissenting). Jett brought considerable assets into the marriage only to eventually file for bankruptcy. *Id.* at 133 (Smith, J., dissenting). During their marriage, David's business grew from making less than $1000 in 1987 to netting more than $47,000 in 1991. *Id.* (Smith, J., dissenting). David caused some of Jett's psychological problems which required medical treatment. *Id.* (Smith, J., dissenting). Justice Smith maintained that granting alimony with a termination period was unfair to Jett. *Hubbard*, 656 So. 2d at 133 (Smith, J., dissenting).

[78] Crockett & Patterson, *supra* note 12, at 58. "The traditional theory of alimony is based on the common law concept that a man should support his wife commensurate with his ability, in the style to which she has become accustomed." *Id.*

[79] Mathur, *supra* note 26, at 312-13. A goal of rehabilitative alimony is to relieve the spouse of additional financial burden. *Id.* Rehabilitative alimony offers

Rehabilitative alimony is the answer to the court's struggle with the inconsistent treatment of durational alimony. This new equitable award is similar to lump sum alimony in that the obligation of the paying spouse ends upon the expiration of the time limit.[80] Also, rehabilitative alimony shares qualities of periodic alimony in that it is modifiable and vests as it accrues.[81] In fact, the only distinguishing feature between periodic and rehabilitative alimony is the termination date.[82] Consequently, because the chancery court may terminate periodic support upon petition, critics argue that there is no need for rehabilitative alimony.[83] However, in answer to this criticism, rehabilitative alimony serves as an encouragement for independence by setting a date in which a spouse should attempt to be self-sufficient.[84] Also, rehabilitative alimony reduces the chancellor's caseload of future petitions for alimony termination.[85]

Rehabilitative alimony is necessary in instances where the traditional forms of alimony would not be appropriate.[86]

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independence to former spouses. *Id.* With the use of rehabilitative alimony, the marital dissolution is theoretically more easily acquired because the husband and wife are linked financially for only the period of readjustment. Veith, *supra* note 28, at 496.

[80] Hubbard v. Hubbard, 656 So. 2d 124, 130 (Miss. 1995). Rehabilitative periodic alimony has a fixed termination period. *Hubbard*, 656 So. 2d at 130.

[81] *Hubbard*, 656 So. 2d at 130. Rehabilitative alimony vests as it accrues and is modifiable. *Id.*

[82] *Id.* The court cited Cleveland v. Cleveland, 600 So. 2d 193, 196 (Miss. 1992) and stated that periodic alimony can not have a fixed termination period. *Id.*

[83] *Id.* at 131 (Pittman, J., dissenting). Periodic alimony is subject to limitation by the chancery court. *Id.* (Pittman, J., dissenting). Justice Pittman argued that alimony with a termination period has always been deemed lump sum support. *Id.* at 132 (Pittman, J., dissenting).

[84] Marshall, *supra* note 12, at 674. Rehabilitative alimony encourages a receiving spouse to seek employment. *Id.* The time limit in the decree prompts a recipient spouse to plan for financial independence, foster work skills, and seek employment. *Id.*

[85] Marshall, *supra* note 12, at 685. There is no need for modification hearings concerning the rehabilitation of the receiving spouse because the termination is preset. *Id.* The time limit associated with rehabilitative alimony lessens future modification hearings. Krauskopf, *supra* note 25, at 582.

[86] *Hubbard*, 656 So. 2d at 130. The court did not allow rehabilitative alimony

Based on other jurisdictions' rehabilitative awards, the court will probably grant this new alimony to individuals who, before the termination of the rehabilitative period, are able to achieve a level of support commensurate with their pre-divorce life.[87] Accordingly, this award should not provide for a transitional period to a lower standard of living.[88] In recognition of the progression of rehabilitative alimony awards in other states, Mississippi chancery courts should not allow the traditional forms of spousal support to become secondary awards.[89]

B. Rehabilitative Alimony as Applied in Hubbard

In *Hubbard*, the court realized that there are instances where circumstances do not satisfy the traditional alimony factors, and therefore the chancery court should award rehabilitative alimony.[90] The court was of the opinion that it should award rehabilitative alimony in instances where the spouse is in a position to become financially independent in the future.[91] However, the court's holding does not explain

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in the *Armstrong* case because the marriage lasted for 21 years. *Id.* The court should consider the duration of the marriage, standard of living during the marriage, husband's earning capacity, wife's earning capacity, wife's contribution to the marriage, their respective health and age, and any effect caused by children. *Id.*

[87] Krauskopf, *supra* note 25, at 577. The trial court attempted to consider evidence demonstrating that the termination period was justified. *Id.*

[88] Krauskopf, *supra* note 25, at 574. The adjustment period, during which the spouse receives alimony, usually eases the spouse to a lower standard of living. *Id.* Usually upon divorce, the receiving spouse's standard of living drops while the obligor spouse experiences a higher standard. Mathur, *supra* note 26, at 316. Usually, rehabilitative alimony allows the spouse to get accustomed to a lesser lifestyle. Marshall, *supra* note 12, at 681.

[89] Marshall, *supra* note 12, at 684. Some states have asserted that periodic or permanent alimony should only be awarded if the spouse proves that he or she can not work. *Id.* A potential recipient must show an "actual financial need" in some jurisdictions to receive alimony. Mathur, *supra* note 26, at 315. If a spouse demonstrates an ability to achieve work, some states are likely to reduce the amount of rehabilitative alimony or drop the alimony altogether even though his or her earnings will not provide enough support. *Id.*

[90] *Hubbard*, 656 So. 2d at 131. The court affirmed the chancellor's award for rehabilitative alimony. *Id.*

[91] *Id.* The court held that the wife in *Hubbard* could be rehabilitated to be-

whether the chancellors must use these factors of consideration or create new factors for awarding rehabilitative alimony.[92] Until clarified, this may create confusion for chancellors who are in need of guidelines for granting rehabilitative alimony.

IV. CONCLUSION

The Mississippi Supreme Court's decision in *Hubbard v. Hubbard* creates a fifth option for chancellors in promoting equity in a marital breakup. By awarding rehabilitative alimony the court recognizes the idea that some receiving spouses are capable of self-sufficiency, and some supporting spouses should not be forever strapped with a financial burden. The court will likely have to use this form of support in conjunction with the traditional forms of alimony, periodic and lump sum in order to achieve a more equitable divorce.

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come self-supporting because she had prior work experience. *Id.* The court did not consider the wife's medical expenses in awarding alimony because the court will not disturb the findings of the chancellor in awarding alimony unless he is found to be "manifestly in error." *Id.* at 131. The court distinguished its holding, *sub judice*, from the holding in *Armstrong* in that the marriage in *Armstrong* lasted 21 years whereas the Hubbards were only married four and one-half years. *Id.* at 130.

[92] *Id.* at 126. The court mentioned the *Retzer* and *Brabham* factors in consideration of alimony awards. *Id.* The court discussed considerations such as financial capabilities and duration of marriage as factors for awarding rehabilitative alimony. *Id.* at 131.

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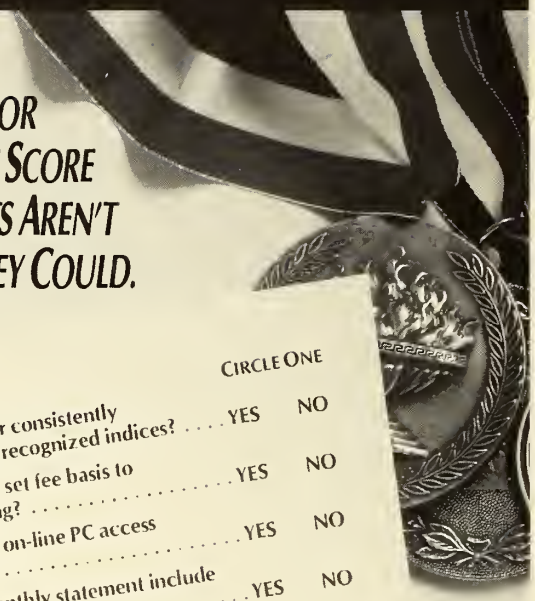

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